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United States

Circuit Court of Appeals

For the Ninth Circuit.

HARRY DEAN,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Southern District of California, Southern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 3459

United States
Circuit Court of Appeals
For the Ninth Circuit.

HARRY DEAN,

Plaintiff in Error,

vs.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States, in and for the Southern District of California, Southern Division.

No. 1813—CRIM.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HARRY DEAN,

Defendant.

Citation to Writ of Error.

United States of America,
Southern District of California,
Southern Division,—ss.

To the United States of America, and to ROBERT S. O'CONNOR, United States Attorney for the Southern District of California, GREETING:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty (30) days from the date hereof, pursuant to the writ of error filed in the clerk's office of the District Court of the United States for the Southern District of California, Southern Division, wherein Harry Dean is plaintiff in error, and you are the defendant in error, to show cause, if any there be, why the judgment of the said writ of error mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

GIVEN under my hand at Los Angeles, California, in said District, this 13th day of January, 1920.

TRIPPET,

Judge of the United States District Court in and for the Southern District of California, Southern Division.

O. K.—GORDON LAWSON.

[Endorsed]: No. 1813—Crim. In the District Court of the United States, in and for the Southern District of California, Southern Division. United States of America, Plaintiff, vs. Harry Dean, Defendant. Citation to Writ of Error. Filed Jan. 13, 1920, at 40 min. past 11 o'clock A. M. Chas. N. Williams, Clerk. Louis J. Somers, Deputy.

Received copy of the within this 12th day of January, 1920.

GORDON LAWSON,
Asst. U. S. Atty.

In the District Court of the United States, in and for the Southern District of California, Southern Division.

No. 1813—CRIM.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HARRY DEAN,

Defendant.

Writ of Error.

United States of America,—ss.

The President of the United States of America, to the Honorable Judge of the District Court of the United States for the Southern District of California, Southern Division, GREETING:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in said District Court before you, between Harry Dean, plaintiff in error, and the United States of America, defendant in error, a manifest error has happened, to the great damage of said Harry Dean, plaintiff in error, as by his complaint appears. We being willing that error, if any hath happened, should be duly corrected and full and speedy justice done to the parties aforesaid, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, and all things concerning the same, to the United States Circuit Court of Appeals, for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, within thirty (30) days from the date hereof, in the said United States Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid, being inspected, the said Circuit Court of Appeals may cause further to be done therein, to correct that error what of right and according to the laws and customs of the United States should be done.

WITNESS, the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, this 13th day of January, 1920.

[Seal] CHAS. N. WILLIAMS,
Clerk of the United States District Court in and for the Southern District of California, Southern Division.

By R. S. Zimmerman,
Deputy.

Allowed by:

OSCAR A. TRIPPET,
Judge.

O. K.—GORDON LAWSON.

[Endorsed]: No. 1813—Crim. In the District Court of the United States, in and for the Southern District of California, Southern Division. United States of America, Plaintiff, vs. Harry Dean, Defendant. Writ of Error. Filed Jan. 13, 1920, at 40 min, past 11 o'clock A. M. Chas. N. Williams, Clerk. Louis J. Somers, Deputy.

Received copy of the within this 12th day of January, 1920.

GORDON LAWSON,
Asst. U. S. Atty.

Names and Addresses of Attorneys.

For Plaintiff in Error:

WARREN L. WILLIAMS,

SEYMOUR S. SILVERTON,

307 South Hill Street, Los Angeles, California.

For Defendant in Error:

ROBERT O'CONNOR, United States Attorney, Los Angeles, California.

GORDON LAWSON, Assistant United States Attorney, Los Angeles, California. [3*]

In the District Court of the United States, in and for the Southern District of California, Southern Division.

Indictment.

Viol. Act Feb. 24, 1919, an Amendment to Harrison Narcotic Act.

At a stated term of said court, begun and holden at the city of Los Angeles, within the Southern Division of the Southern District of California, on the second Monday of July, in the year of our Lord one thousand nine hundred and nineteen,—

The Grand Jurors of the United States of America, duly chosen, selected and sworn, within and for the Division and District aforesaid, on their oath present:

That HARRY DAY, *alias* HARRY DEAN, hereinafter called the defendant, whose full and true

*Page-number appearing at foot of page of original certified Transcript of Record.

name is other than as herein stated, to the Grand Jurors unknown, late of the Southern Division of the Southern District of California, heretofore, to wit, on or about the 12th day of July, in the year of our Lord one thousand nine hundred and nineteen, at the city of Los Angeles, County of Los Angeles, within the Division and District aforesaid, and within the jurisdiction of this Honorable Court, did knowingly, wilfully, unlawfully, fraudulently and feloniously purchase, sell, dispense and distribute cocaine in and from a certain tin box, which said tin box was not then and there the original stamped package containing the said cocaine, that is to say: the said defendant did, at the time and place aforesaid, have in his possession at the corner of Figueroa Street and Sunset Boulevard, in the said city of Los Angeles, county of Los Angeles, the said tin box then and there containing the said cocaine, which said cocaine was then and there a compound, manufacture, salt, [4] derivative and preparation of cocoa leaves, and the said cocaine contained in the said tin box then and there consisted of about one-half (½) of an ounce; and the said tin box then and there containing the said cocaine did not then and there bear and have affixed thereon appropriate tax paid stamps, as required in an Act of Congress approved February 24, 1919, amending an Act of Congress approved December 17, 1914, known as the "Harrison Narcotic Law"; and the said cocaine was not then and there obtained from a registered dealer in pursuance of a prescription written for legitimate medical uses, issued by a physician, dentist, veterinary, surgeon, or

other practitioner registered under the said act; and the said tin box containing the said cocaine did not then and there bear the name and registry number of a druggist, serial number of a prescription, name and address of a patient, and name, address and registry number of the person writing the said prescription; that the said cocaine was not then and there dispensed, administered or given away to a patient by a registered physician, dentist, veterinary surgeon, or other practitioner in the course of his professional practice, and a record kept of the said dispensation, administration and giving away of the said cocaine, as required by the said act.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the said United States. [5]

SECOND COUNT.

And the Grand Jurors aforesaid, on their oath aforesaid, do further present:

That HARRY DAY, *alias* HARRY DEAN, hereinafter called the defendant, whose full and true name is, other than as herein stated, to the Grand Jurors unknown, late of the Southern Division of the Southern District of California, heretofore, to wit, on or about the 12th day of July, in the year of our Lord one thousand nine hundred and nineteen, at the city of Los Angeles county of Los Angeles, within the Division and District aforesaid, and within the jurisdiction of this Honorable Court, did knowingly, wilfully, unlawfully, fraudulently and feloniously purchase, sell, dispense and distribute morphine sulphate, cocaine and heroin in and from certain boxes

and glass tubes, which said boxes and glass tubes were not then and there the original stamped packages containing the said morphine sulphate, cocaine and heroin, that is to say: the said defendant did, at the time and place aforesaid, have in his possession, at #1533 West Temple Street, in the said city of Los Angeles, county of Los Angeles, the said boxes and glass tubes then and there containing the said morphine sulphate, cocaine and heroin; the said morphine sulphate, a compound, manufacture, salt, derivative and preparation of opium, was then and there contained in two (2) small boxes, which said boxes then and there contained one (1) ounce of the said morphine sulphate; the said cocaine, a compound, manufacture, salt, derivative and preparation of cocoa leaves, was then and there contained in a small metal box, which contained about one-half (½) of an ounce of the said cocaine; and the said heroin, a compound, manufacture, salt, derivative and preparation of [6] opium, was then and there contained in two (2) glass tubes, which said glass tubes then and there contained about 100 tablets of the said heroin; and any and either of the aforesaid boxes and glass tubes did not then and there bear and have affixed thereon appropriate tax-paid stamps, as required in the said act; and the said morphine sulphate, cocaine, and heroin was not then and there obtained from a registered dealer, in pursuance of a prescription written for legitimate medical uses, issued by a physician, dentist, veterinary surgeon, or other practitioner registered under an Act of Congress approved February 24, 1919, amending an Act

of Congress approved December 17, 1914, known as the Harrison Narcotic law. And the said boxes and glass tubes, and either of them, containing the said morphine sulphate, cocaine, and heroin did not then and there bear the name and registry number of a druggist, serial number of a prescription, name and address of a patient, and name, address, and registry number of the person writing said prescription. And the said morphine sulphate, cocaine and heroin was not then and there dispensed, administered or given away to a patient by a registered physician, dentist, veterinary surgeon or other practitioner in the course of his professional practice, and a record kept of said dispensation, administration and giving away of the said morphine sulphate, cocaine and heroin, as required by the said act.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the said United States.

GORDON LAWSON,
Assistant United States Attorney,
ROBERT O'CONNOR,
United States Attorney. [7]

[Endorsed]: No. 1813—Crim. United States District Court, Southern District of California, Southern Division. The United States of America vs. Harry Day, *alias* Harry Dean. Indictment—Viol. Act, Feb. 24, 1919, Amendment to Harrison Narcotic Act. A true bill. John McPeak, Foreman. Filed Sep. 4, 1919. Chas. N. Williams, Clerk. Ernest J. Morgan, Deputy. Bail, $1,000.00. [8]

At a stated term, to wit, the July, A. D. 1919, term of the District Court of the United States, within and for the Southern Division of the Southern District of California, held at the courtroom thereof, in the City of Los Angeles, on Monday, the 15th day of September, in the year of our Lord one thousand nine hundred and nineteen. Present: The Honorable OSCAR A. TRIPPET, District Judge.

No. 1813—CRIM.

UNITED STATES OF AMERICA,

Plaintiff.

vs.

HARRY DAY, etc.,

Defendant.

Minutes of Court—September 15, 1919—Arraignment and Plea.

This cause coming on at this time for the arraignment and plea of the defendant; Gordon Lawson, Esq., Assistant U. S. Attorney, counsel for the plaintiff, the defendant on bond together with his counsel S. S. Silverton, Esq., present in open court.

The defendant being duly called and arraigned stated to the Court that his true name is Harry Day, waives the reading of the indictment, and being required to plead to the indictment on file against him at this time, enters his plea of Not Guilty.

This cause is by the Court continued to the October calendar for setting for trial. [9]

At a stated term, to wit, the July, A. D. 1919, term of the District Court of the United States, within and for the Southern Division of the Southern District of Californa, held at the courtroom thereof, in the city of Los Angeles, on Wednesday, the 10th day of December, in the year of our Lord one thousand nine hundred and nineteen. Present: The Honorable BENJAMIN F. BLEDSOE, District Judge.

CONSOLIDATED.

No. 1813—CRIM. S. D.

No. 1847—CRIM. S. D.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HARRY DEAN,

Defendant.

Minutes of Court—December 10, 1919—Trial.

This consolidated cause coming on before the Court and a jury to be impanelled herein; and defendant being present with his counsel, Warren Williams, Esq., and Gordon Lawson, Esq., Assistant U. S. Attorney, present for plaintiff, and counsel for both sides being now ready to proceed with the trial of this cause, and the Court having so ordered that the trial proceed, and that a jury of twelve (12) men be duly impanelled herein, and the following twelve (12) men having been duly drawn from the box, called and sworn on *voir dire,* to wit: Henry C. Bohrmann,

Paul T. Wayne, Chas. W. Hardy, Lovell Swisher, Jr., Karl Klokke, E. J. Vawter, Jr., Edward A. Talbot, George R. Bentel, P. J. Beveridge, A. Sidney Jones, Frank Griffith, H. W. Keller, and the Indictment in each of said cases having been read to the jury, and the jury having been examined by the Court and passed for cause, and A. Sidney Jones, a petit juror herein, for cause shown is now by the Court excused, and J. W. Montgomery, a petit juror, having been called in the place of said juror so excused and having been sworn on *voir dire,* examined by the Court [12] and by counsel for respective parties, and passed for cause; and the plaintiff having at this time exercised no peremptory challenges; and the following named petit jurors having been by the counsel for the defendant peremptorily challenged, to wit: Charles W. Hardy, Karl Klokke, E. J. Vawter, Jr., Edward A. Talbot, and P. J. Beveridge, and as so challenged, said petit jurors excused by the Court; and the names of five (5) other petit jurors having been drawn from the box, called and sworn on *voir dire,* and examined by the Court and passed for cause, to wit: C. H. Lippincott, W. T. Selleck, J. S. Stotler, Ray R. Thomas, E. B. Rivers, and said five jurors having also been passed for cause by counsel for respective parties and no peremptory challenges having been exercised by the plaintiff; and C. H. Lippincott, W. T. Selleck, J. S. Stotler and Ray R. Thomas, having been peremptorily challenged by the defendant, and by the Court excused.

And it appearing to the Court that from challenges and otherwise there is not a petit jury to determine

this cause, it is thereupon by the Court ordered that a special venire of ten (10) jurors be drawn from the bystanders be issued herein, returnable at 2:00 o'clock P. M. of this day, to complete the panel in the cause entitled the United States of America, Plaintiff, vs. Harry Dean, Defendant, Nos. 1813 and 1847—Crim. Consolidated, for the purpose of trial; and,

The Court at the hour of 11:30 o'clock A. M. having taken a recess until 2 o'clock P. M. of this day, and,

Now, at the hour of 2 o'clock P. M. of this date, the Court having reconvened and all the parties being present as before, and the U. S. Marshal having made his return of the special venire, heretofore issued herein, and the names of the special veniremen having been called and all having answered present, to wit: George S. Wilson, H. L. Hovey, C. H. Conrad, A. D. Patterson, Frank C. Wallace, E. D. Robinson, Thomas [13] Strohm, J. A. Bothwell, J. M. Fix and D. F. Brandt, the said special jurors having been sworn and having been examined by the Court as to their qualifications and having been accepted by the Court as special jurors, and their names thereupon being placed in the jury-box, and the Court having ordered that four (4) names be drawn from the box and the names of George S. Wilson, H. L. Hovey, J. A. Bothwell and J. M. Fix, having been drawn from the box, and the Court thereupon having read both of the indictments in the two cases now on trial and having examined the said four jurors for cause and said jurors having been examined by counsel of

the respective parties, and passed for cause and H. L. Hovey, having been peremptorily challenged by Gordon Lawson, Esq., counsel for plaintiff, and excused; and George S. Wilson having been peremptorily challenged by Warren Williams, Esq., of counsel for the defendant and excused; and the names of Thomas Strohm, E. D. Robinson having been duly drawn, and said jurors having been called and examined by the Court and counsel for respective parties for cause and passed for cause, and Thomas Strohm having been peremptorily challenged by Gordon Lawson, Esq., counsel for the Government, and excused, and the name of C. H. Conrad having been drawn and said venireman called and examined by the Court and by counsel for respective parties for cause, and passed for cause, and said jurors now in the box, having been accepted and duly sworn to try this cause, said jury being as follows, to wit:

(JURY)

1.	Henry C. Bohrmann,	7.	E. B. Rivers,
2.	Paul T. Wayne,	8.	J. A. Bothwell,
3.	Lovell Swisher, Jr.,	9.	J. M. Fix,
4.	George R. Bentel,	10.	E. D. Robinson,
5.	Frank Griffith,	11.	C. H. Conrad,
6.	H. W. Keller,	12.	J. W. Montgomery.

And the Court having ordered that the trial of said causes be proceeded with, and Gordon Lawson, Esq., Assistant [14] U. S. Attorney, having waived an opening statement, and a motion of Warren Williams, Esq., counsel for defendant as aforesaid, to exclude all witnesses from the courtroom except the

witness on the stand, having been denied by the Court, to which ruling of the Court counsel for the defendant having requested that an exception be noted; and,

Walter H. Austin, a witness for the plaintiff, having been duly called, sworn and testifies for the United States, and the following exhibits on behalf of the plaintiff having been offered and filed in evidence, as follows, to wit:

"U. S. Ex. 1—Tin box with loose tissue paper wrapper."

"U. S. Ex. 2—Scales in wooden case."

"U. S. Ex. 3—Shaving stick box and paper box."

"U. S. Ex. 4—Two tubes of tablets."

"U. S. Ex. 5—Small bottle white powder."

"U. S. Ex. 6—Hypodermic needle in box."

"U. S. Ex. 7—Small scales."

"U. S. Ex. 8—Small spoon."

"U. S. Ex. 9—Four (4) small pill boxes."

"U. S. Ex. 10—Small box labeled 'The Athens,' etc."

"U. S. Ex. 11—Four slips of paper," and,

Howard J. Brooks, being duly called, sworn and testifies for the United States; and,

Daisy G. Webb, being duly called, sworn and testifies for the United States; and

C. W. Montgomery, being duly called, sworn and testifies for the plaintiff; and the following exhibits on behalf of the plaintiff having been offered and filed in evidence as follows, to wit:

"U. S. Ex. 12—A large box of sundry articles."

"U. S. Ex. 13—A package of small pill boxes, and bundle of sundry articles, including a lady's purse, etc," and,

Now at the hour of 3:40 o'clock P. M. the Court having admonished the jury that during the progress of this case [15] they are not to permit other persons to talk to them, nor themselves talk to other persons about this case, or anything connected with this case, and that, until said cause is finally given them for consideration under the instruction of the Court, they are not to talk with each other about this case, or anything connected therewith; and a recess having been taken for five (5) minutes, and thereafter at the hour of 3:45 o'clock P. M. the Court having reconvened, and counsel being present as before, and the shorthand reporter being present, and the jury all being present, and

C. W. Montgomery, a witness on behalf of the plaintiff, heretofore sworn, now resumes the stand, and having testified herein; and,

O. S. Kunzman, having been duly called, sworn and testifies for the United States; and,

T. F. O'Brien, having been called, sworn and having testified for the plaintiff herein; and,

Mrs. Anna Johnson, having been called, sworn and testified for the United States; and,

Arthur R. Maas, having been called, sworn, and testified herein for the plaintiff; and,

Now, at the hour of 4:05 o'clock P. M., the plaintiff having no further testimony to offer in evidence, thereupon rests.

And a motion of Warren Williams, Esq., counsel for defendant as aforesaid, for an instructed verdict of acquittal, having been denied by the Court, to which ruling of the Court, counsel for defendant having requested that an exception be noted; and,

Harry Dean, a witness for the defendant, having been called, sworn and testified for the defendant; and,

A motion having been made by Gordon Lawson, Esq., [16] counsel for plaintiff herein as aforesaid, the Court ordered that Arthur R. Maas be permitted to temporarily withdraw U. S. Ex. 7 and two pair of small scales included in box marked U. S. Ex. 12; and,

Now, at the hour of 4:50 o'clock P. M., the Court having given the jury the usual admonition, now takes a recess until 10 o'clock A. M., Thursday, December, 11th, 1919. [17]

At a stated term, to wit, the July, A. D. 1919, term of the District Court of the United States, within and for the Southern Division of the Southern District of California, held at the courtroom thereof, in the city of Los Angeles, on Thursday, the 11th day of December, in the year of our Lord one thousand nine hundred and nineteen. Present: The Honorable BENJAMIN F. BLEDSOE, District Judge.

CONSOLIDATED.

No. 1813—CRIM. S. D.

No. 1847—CRIM. S. D.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HARRY DEAN,

Defendant.

Minutes of Court—December 11, 1919—Trial (Continued).

This consolidated cause, coming on before the Court and a jury heretofore impaneled for further trial; and defendant being present with his counsel, Warren Williams, Esq., and Gordon Lawson, Esq., Assistant U. S. Attorney, present for the Government; and W. C. Wren, an official shorthand reporter, being present and acting as such; and the jury all being present; and it appearing that Warren Williams, Esq., attorney for defendant, is engaged in the impanelment of a jury in the Honorable Judge Trippet's court, at this time, it is ordered, at the hour of 10:35 o'clock A. M., that a recess be taken until the completion of that impanelment; and,

Now, at the hour of 11 o'clock A. M., the Court having reconvened, and all the parties being present as before; and

The defendant having no further testimony to offer in evidence, thereupon rests his case; and,

The plaintiff, having no rebuttal testimony to offer at this time, rests his case; and, [18]

Warren L. Williams, Esq., attorney for defendant as aforesaid, having moved the Court for an instructed verdict of acquittal, which motion having been denied by the Court, to which ruling of the Court counsel for defendant having requested that an exception be noted; and,

Gordon Lawson, Esq., Assistant U. S. Attorney, counsel for plaintiff, now makes opening argument on behalf of the plaintiff, and having concluded same; and Warren L. Williams, Esq., counsel for defendant, having argued in opposition thereto and having concluded same; and Gordon Lawson now makes his closing argument on behalf of the plaintiff, and having concluded the same, and,

The Court having given its instructions to the jury; and,

Warren L. Williams, Esq., counsel for defendant, having noted exceptions to all instructions, and having excepted to refusal of the Court to give defendant's requested instructions, and having excepted to comments of the Court on evidence and now at the hour of 12 o'clock Alfred Moore, a deputy U. S. Marshal, having been duly sworn as bailiff to take charge of the jury, and the jury having retired in charge of said sworn bailiff for consideration of their verdict, and thereafter, at the hour of 1 o'clock P. M., the jury having returned for further instructions; and defendant and counsel for both sides being present as before; and further instructions having been given; and now at the hour of 1:05 o'clock P. M., the jury having retired in charge of aforesaid sworn bailiff for further consideration of their verdict; and now,

at the hour of 1:10 o'clock P. M., it is ordered that the jury be taken out to lunch in charge of said sworn bailiff, said lunch to be at the expense of the United States; and,

The Court at the hour of 1:10 o'clock P. M. of this date, having taken a recess until the incoming of the jury; [19] and,

Now, at the hour of 3 o'clock P. M. of this date, the Court having reconvened, and defendant and attorneys for both parties being present as before, and the jury having returned into court, and having been requested to present their verdict in each of said causes, and said jurors through their foreman having presented their verdicts, which verdicts are read by the clerk and by the Court ordered filed and entered herein; said verdicts, being as follows, to wit:

"*In the District Court of the United States in and for the Southern District of California, Southern Division.*

No. 1813—CRIM. S. D.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HARRY DEAN,

Defendant.

We, the jury in the above-entitled cause, find the defendant Harry Dean Guilty as charged in the first count of the indictment, and Guilty as charged in the second count of the Indictment.

Los Angeles, California, December 11, 1919.

J. M. FIX,
Foreman."

"*In the District Court of the United States in and for the Southern District of California, Southern Division.*

No. 1847—CRIM.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HARRY DEAN,

Defendant.

We, the Jury in the above-entitled case, find the defendant Harry Dean Guilty as charged in the Indictment.

Los Angeles, California, December 11th, 1919.

J. M. FIX,
Foreman."

And a motion having been made by Warren Williams, Esq., counsel for defendant, as aforesaid, this cause is continued to the hour of 1:30 o'clock P. M. of Wednesday, December 17th, 1919, for the imposing of sentence. [20]

In the District Court of the United States in and for the Southern District of California, Southern Division.

No. 1813—CRIM.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HARRY DEAN,

Defendant.

Verdict.

We, the jury, in the above-entitled case, find the defendant, Harry Dean, guilty as charged in the first count of the indictment, and guilty as charged in the second count of the indictment.

Los Angeles, California, December 11, 1919.

J. M. FIX,
Foreman.

[Endorsed]: No. 1813—Crim. United States District Court, Southern District of California, Southern Division. United States v. Harry Dean. Verdict. Filed Dec. 11, 1919. Chas. N. Williams, Clerk. By Maury Curtis, Deputy Clerk. [21]

At a stated term, to wit, the July, A. D. 1919, term of the District Court of the United States, within and for the Southern Division of the Southern District of California, held at the courtroom thereof, in the city of Los Angeles, on Tuesday, the 30th day of December, in the year of our Lord one thousand nine hundred and nineteen. Present: The Honorable BENJAMIN F. BLEDSOE, District Judge.

No. 1813—Crim. S. D.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HARRY DEAN,

Defendant.

Minutes of Court—December 30, 1919—Judgment.

This cause coming at this time for the sentence of defendant; defendant being present in the custody of the United States Marshal, Gordon Lawson, Esq., Assistant U. S. Attorney, being present as attorney for the Government; and Warren L. Williams, Esq., appearing as counsel for defendant, the Court thereupon pronounces judgment upon said defendant, Harry Dean, for the offense of which he now stands convicted, viz.: Viol. Act of February 24th, 1919, amendment to Harrison Narcotic Act.

The judgment of the Court is that said defendant be imprisoned in the United States Penitentiary at McNeil Island, State of Washington, for the term and period of four (4) years on the first count of the

Indictment, and that said defendant be imprisoned in the United States Penitentiary at McNeil Island, State of Washington, for the term and period of four (4) years on the second count of the Indictment, said term and period of four years on the second count of the Indictment to begin at the expiration of the sentence on the first count. It is further ordered by the Court that the defendant be, and he hereby is, granted a ten (10) days' stay of execution. [30]

In the District Court of the United States of America, in and for the Southern District of California, Southern Division.

No. 1813—CRIM.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

HARRY DEAN,
Defendant.

Certificate of Clerk U. S. District Court to Transcript of Record.

I, Chas. N. Williams, Clerk of the District Court of the United States of America, in and for the Southern District of California, do hereby certify the foregoing seventy-two typewritten pages, numbered from 1 to 72, inclusive, and comprised in one volume, to be a full, true and correct copy of the indictment, arraignment and plea, minutes of the trial, defendant's requested instructions, verdict, sentence and judgment of the Court, petition for writ of error,

assignment of errors, order allowing writ of error, writ of error, citation on writ of error, praecipe and amended praecipe in the above and therein entitled action, and that the same together constitute the record in said action as specified in the said praecipe filed in my office on behalf of the plaintiff in error by his attorney of record.

I do further certify that the cost of the foregoing record is $18.85, the amount whereof has been paid me by the plaintiff in error herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, this 6th day of February, in the year of our Lord one thousand nine hundred and twenty [73] and of our Independence the one hundred and forty-fourth.

[Seal] CHAS. N. WILLIAMS,
Clerk of the District Court of the United States of America in and for the Southern District of California.

By R. S. Zimmerman,
Deputy Clerk. [74]

[Endorsed]: No. 3459. United States Circuit Court of Appeals for the Ninth Circuit. Harry Dean, Plaintiff in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District

Court of the Southern District of California, Southern Division.

Filed February 26, 1920.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

Upon Writ of Error to the United States District Court for the Southern District of California, Southern Division.

U. S. District Court No. 1813—CRIMINAL.

HARRY DEAN,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Statement of Plaintiff in Error of Errors to be Relied Upon and Designation of Parts of Record Necessary to be Printed for Consideration Thereof, Under Section 8, of Rule 23 of Rules of United States Circuit Court of Appeals, Ninth Circuit.

To the Clerk of the United States Circuit Court of Appeals, Ninth Circuit.

Comes now Harry Dean, plaintiff in error, above named, and files the following statement of the errors

upon which he intends to rely and of the parts of the records which he thinks necessary for the consideration of the said errors, to wit:

I.

That the Court erred in rendering its judgment against the plaintiff in error upon count one (1) of the Indictment in this cause, for the reason that the said count one (1) of the Indictment of said cause does not state facts sufficient to constitute a public offense, or any offense or crime against the laws or statutes of the United States of America, or the violation of any law or statute of the United States of America, whatsoever or at all.

II.

That the Court erred in rendering its judgment in this cause *in this cause* against the plaintiff in error upon count two (2) of the Indictment, for the reason that said count two (2) of the Indictment does not state facts sufficient to constitute a public offense, or any offense or crime against the laws or statutes of the United States of America, or the violation of any law of the United States of America, whatsoever or at all.

And the plaintiff in error, Harry Dean, designates the following part of the record as necessary to the consideration of said errors and requests that said part of the clerk's transcript of the record be printed, to wit:

Addresses and Names of Attorneys, Clerk's Transcript of Record, page 3.

Indictment, Count One, Clerk's Transcript of Record, page 4.

Indictment, Count Two, Clerk's Transcript of Record, page 6.

Arraignment and Plea of Plaintiff in Error, Clerk's Transcript of Record, page 9.

Minutes of the Trial, and, etc., Clerk's Transcript of Record, pages 12–20.

Verdict, Clerk's Transcript of Record, page 21.

Judgment, Clerk's Transcript of Record, page 30.

Clerk's Certificate to Transcript of Record, Clerk's Transcript of Record, page 73.

Citation on Writ of Errors, Clerk's Transcript of Record, I.

Writ of Error, Clerk's Transcript of Record, III.

This 24th day of February, 1920.

WARREN L. WILLIAMS,
SEYMOUR S. SILVERTON,
Attorneys for Plaintiff in Error.

[Endorsed]: 3459—Original. United States Circuit Court of Appeals, for the Ninth Circuit. Harry Dean, Plaintiff in Error, vs. United States of America, Defendant in Error.

Received copy of the within this 24th day of February, 1920.

GORDON LAWSON,
Asst. U. S. Atty.

In the District Court of the United States, in and for the Southern District of California, Southern Division.

No. 1813—CRIM.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HARRY DEAN,

Defendant.

Order Extending Time to and Including March 1, 1920, to File Record and Docket Cause.

Good cause appearing therefor, it is hereby ordered, that the defendant in the above-entitled cause, Harry Dean, may have to and including the first day of March, 1920, in which to docket and file the record of the above-entitled cause in the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California.

Dated at Los Angeles, California, February 4th, 1920.

BLEDSOE,
United States District Judge.

[Endorsed]: No. 3459. United States Circuit of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to Mar. 1, 1920, to File Record Thereof and to Docket Case. Filed Feb. 5, 1920. F. D. Monckton, Clerk. Refiled Feb. 26, 1920. F. D. Monckton, Clerk.

No. 3459.

IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Harry Dean,
Plaintiff in Error,
vs.
The United States of America,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

Upon Writ of Error to the United States District Court, for the Southern District of California, Southern Division.

WARREN L. WILLIAMS,
SEYMOUR S. SILVERTON,
419 Ferguson Building, Los Angeles, Cal.,
Attorneys for Plaintiff in Error.

Parker & Stone Co., Law Printers, 232 New High St., Los Angeles, Cal.

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No. 3459.

IN THE

District Court of the United States

IN AND FOR THE

Southern District of California,

Southern Division.

Harry Dean,
Plaintiff in Error,
vs.
The United States of America,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

Plaintiff in error was proceeded against in the District Court of the Southern District of California, Southern Division, under an indictment purporting to charge him with a violation of the Harrison Narcotic Law, as amended by the act of Congress, approved February 24th, 1919. The indictment was in two counts, and defendant below, plaintiff in error herein, was found guilty by a jury of both counts in the in-

dictment. Thereafter he was sentenced by the Honorable Benjamin F. Bledsoe, below, to imprisonment at McNeil's Island, state of Washington, for a term and period of four (4) years upon each count in the indictment, the sentence upon the second count of the indictment to begin at the expiration of the sentence on the first count. From the said judgment plaintiff in error prosecutes this writ of error.

SPECIFICATIONS OF ERROR.

I.

That the court erred in rendering its judgment against the plaintiff in error upon Count One of the indictment in this cause, for the reason that the said Count One of the indictment in said cause does not state facts sufficient to constitute a public offense, or any offense or crime against the laws or statutes of the United States of America, or the violation of any law or statute of the United States of America, whatsoever or at all.

II.

That the court erred in rendering its judgment in this cause against the plaintiff in error upon Count Two of the indictment in this cause for the reason that the said Count Two of the indictment does not state facts sufficient to constitute a public offense, or any offense or crime against the laws or statutes of the United States of America, or the violation of any law of the United States of America whatsoever or at all.

ARGUMENT AND AUTHORITIES.

That the Court Erred in Rendering Its Judgment Against the Plaintiff in Error Upon Count One of the Indictment in This Cause, for the Reason That the Said Count One of the Indictment in Said Cause Does Not State Facts Sufficient to Constitute a Public Offense, or Any Offense or Crime Against the Laws or Statutes of the United States of America, or the Violation of Any Law or Statute of the United States of America, Whatsoever or at All.

The said count of the indictment does not state facts sufficient to constitute an offense against the United States since *in effect* it merely charges the defendant with having certain narcotics in his possession, which we contend is not a violation of the Harrison Narcotic Act, as amended by an act of Congress, approved February 24th, 1919.

It is unnecessary to draw this Honorable Court's attention to the numerous provisions of the Harrison Act. We contend that the gist of a violation of the act is the purchasing, dispensing, distributing, etc., of narcotics from packages or receptacles which have not affixed thereon appropriate tax-paid stamps; the Harrison Narcotic Act is a revenue act. The indictment in said cause reads as follows:

"INDICTMENT.

Viol. Act Feb. 24, 1919, an Amendment to Harrison Narcotic Act.

At a stated term of said court, begun and holden at the city of Los Angeles, within the Southern Division of the Southern District of California, on the second Monday of July, in the year of our Lord one thousand nine hundred and nineteen,—

The grand jurors of the United States of America, duly chosen, selected and sworn, within and for the division and district aforesaid, on their oath present:

That Harry Day, alias Harry Dean, hereinafter called the defendant, whose full and true name is other than as herein stated, to the grand jurors unknown, late of the Southern Division of the Southern District of California, heretofore, to-wit, on or about the 12th day of July, in the year of our Lord one thousand nine hundred and nineteen, at the city of Los Angeles, county of Los Angeles, within the division and district aforesaid, and within the jurisdiction of this Honorable Court, did knowingly, wilfully, unlawfully, fraudulently and feloniously purchase, sell, dispense and distribute cocaine in and from a certain tin box, which said tin box was not then and there the original stamped package containing the said cocaine, that is to say: The said defendant did, at the time and place aforesaid, have in his possession at the corner of Figueroa street and Sunset boulevard, in the said city of Los Angeles, county of Los Angeles, the said tin box then and there containing the said cocaine, which said cocaine was then and there a compound, manufacture, salt, (4) derivative and preparation of cocoa leaves, and the said cocaine contained in the said tin box then and there consisted of about one-half (½) of an ounce; and the said tin box then and there con-

taining the said cocaine did not then and there bear and have affixed thereon appropriate tax paid stamps, as required in an act of Congress approved February 24, 1919, amending an act of Congress approved December 17, 1914, known as the 'Harrison Narcotic Law'; and the said cocaine was not then and there obtained from a registered dealer in pursuance of a prescription written for legitimate medical uses, issued by a physician, dentist, veterinary surgeon, or other practitioner registered under the said act; and the said tin box containing the said cocaine did not then and there bear the name and registry number of a druggist, serial number of a prescription, name and address of a patient, and name, address and registry number of the person writing the said prescription; that the said cocaine was not then and there dispensed, administered or given away to a patient by a registered physician, dentist, veterinary surgeon, or other practitioner in the course of his professional practice, and a record kept of the said dispensation, administration and giving away of the said cocaine, as required by the said act.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the said United States. (5)

SECOND COUNT.

And the grand jurors aforesaid, on their oath aforesaid, do further present:

That Harry Day, alias Harry Dean, hereinafter called the defendant, whose full and true name is, other than as herein stated, to the grand jurors unknown, late of the Southern Division of the Southern District of California, heretofore, to-wit, on or about the 12th day of July, in the year of our Lord one thousand nine hundred and nineteen, at the city of Los Angeles, county of Los Angeles, within the divi-

sion and district aforesaid, and within the jurisdiction of this Honorable Court, did knowingly, wilfully, unlawfully, fraudulently and feloniously purchase, sell, dispense and distribute morphine sulphate, cocaine and heroin in and from certain boxes and glass tubes, which said boxes and glass tubes were not then and there the original stamped packages containing the said morphine sulphate, cocaine and heroin, that is to say: The said defendant did, at the time and place aforesaid, have in his possession, at #1533 West Temple street, in the said city of Los Angeles, county of Los Angeles, the said boxes and glass tubes then and there containing the said morphine sulphate, cocaine and heroin; the said morphine sulphate, a compound, manufacture, salt, derivative and preparation of opium, was then and there contained in two (2) small boxes, which said boxes then and there contained one (1) ounce of the said morphine sulphate; the said cocaine, a compound, manufacture, salt, derivative and preparation of cocoa leaves, was then and there contained in a small metal box, which contained about one-half (½) of an ounce of the said cocaine; and the said heroin, a compound, manufacture, salt derivative and preparation of (6) opium, was then and there contained in two (2) glass tubes, which said glass tubes then and there contained about 100 tablets of the said heroin; and any and either of the aforesaid boxes and glass tubes did not then and there bear and have affixed thereon appropriate tax-paid stamps, as required in the said act; and the said morphine sulphate, cocaine and heroin was not then and there contained from a registered dealer, in pursuance of a prescription written for legitimate medical uses, issued by a physician, dentist, veterinary surgeon, or other practitioner registered under an act of Congress approved February 24, 1919, amending an act of Congress approved

December 17, 1914, known as the Harrison Narcotic Law. And the said boxes and glass tubes, and either of them, containing the said morphine sulphate, cocaine and heroin did not then and there bear the name and registry number of a druggist, serial number of a prescription, name and address of a patient, and name, address and registry number of the person writing said prescription. And the said morphine sulphate, cocaine and hereoin was not then and there dispensed, administered or given away to a patient by a registered physician, dentist, veterinary surgeon or other practitioner in the course of his professional practice, and a record kept of said dispensation, administration and giving away of the said morphine sulphate, cocaine and hereoin, as required by the said act.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the said United States.

GORDON LAWSON,
Assistant United States Attorney.
ROBERT O'CONNOR,
United States Attorney. (7)

(Endorsed): No. 1813—Crim. United States District Court, Southern District of California, Southern Division. The United States of America vs. Harry Day, alias Harry Dean. Indictment—Viol. Act Feb. 24, 1919, amendment to Harrison Narcotic Act. A true bill, John McPeak, foreman. Filed Sep. 4, 1919. Chas. N. Williams, clerk. Ernest J. Morgan, deputy. Bail, $1,000.00. (8)" [Rep. Tr. pp. 5 to 9, inclusive.]

It will be noted that after employing the following language: *"Did knowingly, wilfully, unlawfully, fraudulently and feloniously purchase, sell, dispense and distribute cocaine in and from a certain tin box,*

sion and district aforesaid, and within the jurisdiction of this Honorable Court, did knowingly, wilfully, unlawfully, fraudulently and feloniously purchase, sell, dispense and distribute morphine sulphate, cocaine and heroin in and from certain boxes and glass tubes, which said boxes and glass tubes were not then and there the original stamped packages containing the said morphine sulphate, cocaine and heroin, that is to say: The said defendant did, at the time and place aforesaid, have in his possession, at #1533 West Temple street, in the said city of Los Angeles, county of Los Angeles, the said boxes and glass tubes then and there containing the said morphine sulphate, cocaine and heroin; the said morphine sulphate, a compound, manufacture, salt, derivative and preparation of opium, was then and there contained in two (2) small boxes, which said boxes then and there contained one (1) ounce of the said morphine sulphate; the said cocaine, a compound, manufacture, salt, derivative and preparation of cocoa leaves, was then and there contained in a small metal box, which contained about one-half (½) of an ounce of the said cocaine; and the said heroin, a compound, manufacture, salt derivative and preparation of (6) opium, was then and there contained in two (2) glass tubes, which said glass tubes then and there contained about 100 tablets of the said heroin; and any and either of the aforesaid boxes and glass tubes did not then and there bear and have affixed thereon appropriate tax-paid stamps, as required in the said act; and the said morphine sulphate, cocaine and heroin was not then and there contained from a registered dealer, in pursuance of a prescription written for legitimate medical uses, issued by a physician, dentist, veterinary surgeon, or other practitioner registered under an act of Congress approved February 24, 1919, amending an act of Congress approved

December 17, 1914, known as the Harrison Narcotic Law. And the said boxes and glass tubes, and either of them, containing the said morphine sulphate, cocaine and heroin did not then and there bear the name and registry number of a druggist, serial number of a prescription, name and address of a patient, and name, address and registry number of the person writing said prescription. And the said morphine sulphate, cocaine and hereoin was not then and there dispensed, administered or given away to a patient by a registered physician, dentist, veterinary surgeon or other practitioner in the course of his professional practice, and a record kept of said dispensation, administration and giving away of the said morphine sulphate, cocaine and hereoin, as required by the said act.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the said United States.

GORDON LAWSON,
Assistant United States Attorney.
ROBERT O'CONNOR,
United States Attorney. (7)

(Endorsed): No. 1813—Crim. United States District Court, Southern District of California, Southern Division. The United States of America vs. Harry Day, alias Harry Dean. Indictment—Viol. Act Feb. 24, 1919, amendment to Harrison Narcotic Act. A true bill, John McPeak, foreman. Filed Sep. 4, 1919. Chas. N. Williams, clerk. Ernest J. Morgan, deputy. Bail, $1,000.00. (8)" [Rep. Tr. pp. 5 to 9, inclusive.]

It will be noted that after employing the following language: *"Did knowingly, wilfully, unlawfully, fraudulently and feloniously purchase, sell, dispense and distribute cocaine in and from a certain tin box,*

which said tin box was not then and there the original stamped package containing the said cocaine," the indictment goes on to state as follows:

"THAT IS TO SAY: the said defendant did at the time and place aforesaid, *have in his possession at the corner of Figueroa street and Sunset boulevard in the said city of Los Angeles, county of Los Angeles, the said tin box then and there containing the said cocaine, which said cocaine was then and there a compound, manufacture, salt, derivative and preparation of cocoa leaves, and the said cocaine contained in the said tin box then and there consisted of about one-half (½) of an ounce, and the said tin box then and there containing the said cocaine did not then and there bear and have affixed thereon appropriate tax-paid stamps, as required in an act of Congress approved December 17th, 1914, known as the Harrison Narcotic Law, etc."* (Italics are ours.)

In other words, what precedes the language, *"that is to say: etc."* (italics are ours), is modified by the language following the averment "that is to say," and the indictment is no more potent than to allege upon a certain time and place defendant below, plaintiff in error herein, had in his possession certain drugs; and it is contended that possession of narcotics is not a violation under this act. There can be no doubt that there is a contradiction of terms between the averments of the indictment. After the indictment charge that the defendant below did knowingly, wilfully, unlawfully, fraudulently and feloniously purchase, sell, dispense and distribute cocaine, this language is modified, amended, minimized and nullified by the allegation

beginning, "that is to say" he had said drugs in his possession at such a time and place. There is a vast distinction between the two.

If this Honorable Court does not so construe the language or if the language "that is to say, that said defendant did at the time and place aforesaid, have in his possession in the city of Los Angeles, state of California, a tin box containing cocaine, etc.," is held to be an averment of the essential facts that are necessary to set forth the offense charged in the indictment, then sufficient facts are not alleged to justify the charge in the said indictment, to-wit: the unlawful purchasing, selling, dispensing and distributing of said drugs, for possession alone is alleged, and possession in itself we contend is not sufficient to charge a sale or the dispensing or distributing of drugs, and the indictment in that respect is insufficient.

Under the Harrison Narcotic Act, prior to the amendment by act of Congress, approved February 24, 1919, to section 1 thereof, it seems to be settled that mere possession of drugs for one's own use does not fall within the inhibition of the act.

Wallace v. United States, 243 Fed. 300;
U. S. v. Carney, 228 Fed. 163;
U. S. v. Jin Moy, 24 Fed. 1003.

We have been unable to find any case bearing upon the question as to whether or not possession of drugs in packages not having affixed thereon tax-paid stamps constitutes a violation of the Harrison Narcotic Law, as amended by the act of Congress of February 24,

1919. If such possession constitutes a violation of said act, it is conceded that the indictment herein is sufficient, and the writ of error herein is ineffectual.

The language used in the said amendment of 1919 to the said act is as follows:

> "It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the aforesaid drugs except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be *prima facie* evidence of a violation of this section by the person in whose possession same may be found; and the possession of any original stamped package containing any of the aforesaid drugs, by any person who has not registered and paid special taxes as required by this section shall be *prima facie* evidence of liability to such special tax: * * *"

We believe that while primarily the said act is a revenue measure, it also has this object in view—to suppress illegal traffic in drugs, and that it was not intended to apply to addicts or those having the possession of narcotics for their own use. In other words, that the said act was designed against the dealer and trafficker in drugs rather than the "user."

It will in all probability be urged that that part of the indictment beginning with the words, "that is to say," etc., be rejected as surplusage, leaving the charging part of the indictment as follows: "That the defendant did knowingly, wilfully, unlawfully, fraudulently and feloniously, purchase, sell, dispense and distribute cocaine in and from a certain tin box, which said tin box was not then and there *the original stamped package* containing the said cocaine." (Italics

are ours.) But it is submitted that leaving the indictment in this form would not make it sufficient, for it merely charges him with selling, buying, etc., cocaine from a tin box, which box was not then and there the original stamped package. What is meant by the term "original stamped package"? To an ordinary person it surely could not mean a failure to have appropriate tax-paid stamps affixed to the receptacle containing the purported drugs; and we take that to be the gist of the offense herein. The term "original stamped package" in itself is meaningless, and therefore the portion of the indictment herein considered in itself does not contain facts sufficient to constitute an offense against the laws of the United States.

The principle applicable to the defects in the said indictment is not that the evidence subsequently taken shows the defendant's guilt, but that there was no proper procedure before the court to justify the taking of that evidence.

Without burdening this Honorable Court with a repetition of the allegation urged upon the first count herein, it is submitted that the second count is defective in the particulars wherein the first count of the indictment is insufficient.

It is therefore submitted that neither count of the indictment is sufficient in the particulars herein urged, and that the judgment be reversed and remanded for a new trial.

Respectfully submitted,

WARREN L. WILLIAMS,

SEYMOUR S. SILVERTON,

Attorneys for Plaintiff in Error.

No. 3459.

IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Harry Dean,
Plaintiff in Error,
vs.
The United States of America,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

ROBERT O'CONNOR,
United States Attorney,
GORDON LAWSON,
Assistant United States Attorney.

Parker & Stone Co., Law Printers, 232 New High St., Los Angeles, Cal.

No. 3459.

IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Harry Dean,
Plaintiff in Error,
vs.
The United States of America,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

ARGUMENT.

On page 5 of his brief, plaintiff in error states the only point raised, as follows:

"That the court erred in rendering its judgment against the plaintiff in error upon Count One of the indictment in this cause, for the reason that the said Count One of the indictment in said cause does not state facts sufficient to constitute a public offense, or any offense or crime against the laws or statutes of the United States of America, or the violation of any law or statute of the United States of America, whatsoever or at all."

The indictment in question charges a violation of section one of the Harrison Narcotic Act, as amended by an Act of Congress approved February 24, 1919, Volume 40, U. S. Statutes at Large, chapter 18, page 1057, entitled "An act to provide revenue and for other purposes." At page 1131, that part of the act descriptive of this offense is as follows:

> "It shall be unlawful for any person to purchase, sell, dispense or distribute any of the aforesaid drugs except in the original stamped package or from the original stamped package; and the absence of appropriate tax paid stamps from any of the aforesaid drugs shall be *prima facie* evidence of the violation of this section by the person in whose possession same may be found."

The indictment in the case at bar charges the plaintiff in error in the first count as follows:

"Did knowingly, wilfully, unlawfully, fraudulently and feloniously purchase, sell, dispense and distribute cocaine in and from a certain tin box, which said tin box was not then and there the original stamped package containing the said cocaine." [Transcript of Record, page 6.]

By a comparison of the statute and the language in the indictment, it is clear that in the latter the exact statutory language was used.

It is, of course, unnecessary before this Honorable Court to cite authorities in support of the proposition that, where the offense is statutory, an indictment is sufficient in its allegations if it follows the statutory language. However, in addition to the use of the

statutory language, the indictment furnished to the plaintiff in error a more particular description of the evidence he would have to meet. The first count continues:

"The said defendant did at the time and place aforesaid have in his possession at the corner of Figueroa street and Sunset boulevard, in the said city of Los Angeles, county of Los Angeles, the said tin box then and there containing the said cocaine, which said cocaine was then and there a compound, manufacture, salt, derivative and preparation of cocoa leaves, and the said cocaine contained in the said tin box then and there consisted of about one-half of an ounce; and the said tin box then and there containing the said cocaine did not then and there bear and have affixed thereon appropriate tax paid stamps, as required in an Act of Congress approved December 17, 1914, known as the Harrison Narcotic Law, etc." [Transcript of Record, page 6.]

We agree with plaintiff in error that the gist of the offense is the purchasing, distributing, dispensing and selling of narcotics. (His brief, page 5.) The act, however, provides that in proof of that violation a *prima facie* case may be made by showing the possession of any of the forbidden narcotics without having affixed thereto appropriate tax paid stamps. (40 Statutes at Large, page 1131, *supra.*)

This indictment might be subject to the criticism that an attempt was made to furnish to the plaintiff in error too detailed a description of the offense with which he was charged, but it is certainly not open to

the charge that the allegations are insufficient, which the plaintiff in error here raises for the first time.

Plaintiff in error has cited no authority for his position. On page 11 of his brief he cites three cases to the effect that under the Harrison Narcotic Act prior to the amendment approved February 24th, 1919, that that part of section eight of the old act was held unconstitutional in so far as it related to the mere possession by one who was not required to register as a dealer and pay a special tax. It has been consistently held that Federal courts have no jurisdiction unless a Federal tax was involved, and that it was an usurpation of state police power to punish for mere possession where no tax was involved. It is submitted that the very purpose of section one of the amended act of February 24th, 1919, *supra,* was to extend the jurisdiction of the United States courts to the offenses which the above decisions have restricted them. This was done by making it not an offense to have possession, but to make possession *prima facie* proof of purchasing, selling and distributing in and from packages not bearing the appropriate tax paid stamps.

It is submitted that the indictment in this case was sufficient.

Respectfully,

ROBERT O'CONNOR,
United States Attorney,
GORDON LAWSON,
Assistant United States Attorney.

No. 3460

United States

Circuit Court of Appeals

For the Ninth Circuit.

HARRY DEAN,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Southern District of California, Southern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 3460

United States

Circuit Court of Appeals

For the Ninth Circuit.

HARRY DEAN,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Southern District of California, Southern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States, in and for the Southern District of California, Southern Division.

No. 1847—CRIM.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HARRY DEAN,

Defendant.

Writ of Error.

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to the Honorable Judge of the District Court of the United States for the Southern District of California, Southern Division, GREETING:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in said District Court before you, between Harry Dean, plaintiff in error, and the United States of America, defendant in error, a manifest error has happened, to the great damage of said Harry Dean, plaintiff in error, as by his complaint appears. We being willing that error, if any hath happened, should be duly corrected and full and speedy justice done to the parties aforesaid, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, and all things concerning the same, to the United States Circuit Court of Appeals, for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the

State of California, within thirty (30) days from the date hereof, in the said United States Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid, being inspected, the said Circuit Court of Appeals may cause further to be done therein, to correct that error what of right and according to the laws and customs of the United States should be done.

WITNESS, the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, this 13th day of January, 1920.

[Seal] CHAS. N. WILLIAMS,
Clerk of the United States District Court in and for the Southern District of California, Southern Division.

By R. S. ZIMMERMAN,
Deputy.

Allowed by:

TRIPPET,
Judge.

O. K.—GORDON LAWSON.

[Endorsed:] No. 1847—Crim. In the District Court of the United States, in and for the Southern District of California, Southern Division. United States of America, Plaintiff, vs. Harry Dean, Defendant. Writ of Error. Filed Jan. 13, 1920, at 40 min, past 11 o'clock A. M. Chas. N. Williams, Clerk. Louis J. Somers, Deputy.

Received copy of the within this 12th day of January, 1920.

GORDON LAWSON,
Asst. U. S. Atty.

In the District Court of the United States, in and for the Southern District of California, Southern Division.

No. 1847—CRIM.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HARRY DEAN,

Defendant.

Citation to Writ of Error.

United States of America,
Southern District of California,
Southern Division,—ss.

To the United States of America, and to ROBERT S. O'CONNOR, United States Attorney for the Southern District of California, GREETING:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty (30) days from the date hereof, pursuant to the writ of error filed in the clerk's office of the District Court of the United States for the Southern District of California, Southern Division, wherein Harry Dean is plaintiff in error, and you are the defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

GIVEN under my hand at Los Angeles, California, in said District, this 13th day of January, 1920.

TRIPPET,

Judge of the United States District Court in and for the Southern District of California, Southern Division.

O. K.—GORDON LAWSON.

[Endorsed]: No. 1847—Crim. In the District Court of the United States, in and for the Southern District of California, Southern Division. United States of America, Plaintiff, vs. Harry Dean, Defendant. Citation to Writ of Error. Filed Jan. 13, 1920, at 40 min. past 11 o'clock A. M. Chas. N. Williams, Clerk. Louis J. Somers, Deputy.

Received copy of the within this 12th day of January, 1920.

GORDON LAWSON,
Asst. U. S. Atty.

Names and Addresses of Attorneys.

For Plaintiff in Error:

WARREN L. WILLIAMS,
SEYMOUR S. SILVERTON,
307 South Hill Street, Los Angeles, California.

For Defendant in Error:

ROBERT O'CONNOR, United States Attorney, Los Angeles, California.

GORDON LAWSON, Assistant United States Attorney, Los Angeles, California. [3*]

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*Page-number appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States, in and for the Southern District of California, Southern Division.

Indictment.

Viol. Act. Feb. 24, 1919, Amending Act of Dec. 17, 1914, Harrison Narcotic Act.

At a stated term of said court, begun and holden at the city of Los Angeles, within the Southern Division of the Southern District of California, on the second Monday of July, in the year of our Lord one thousand nine hundred and nineteen;

The Grand Jurors of the United States of America, duly chosen, selected and sworn, within and for the Division and District aforesaid, on their oath present:

That HARRY DAY, *alias* HARRY DEAN, *alias* FRANKLIN P. BLAIR, whose full and true name other than as herein stated is to the Grand Jurors unknown, late of the Southern Division of the Southern District of California, heretofore, to wit, on or about the 17th day of October, in the year of our Lord one thousand nine hundred and nineteen, at the city of Pasadena, county of Los Angeles, and within the State and Southern Division of the Southern District of California, and within the jurisdiction of this Honorable Court, did knowingly, wilfully, unlawfully and feloniously sell, dispense and distribute morphine and cocaine in and from six paper bags, ten small cardboard boxes, one small celluloid box and one small metal box, which said bags and boxes, and either and each of them, were not then and there the original stamped pack-

ages containing the said morphine and said cocaine; and the said morphine was then and there a compound, manufacture, salt, derivative and preparation of opium, and the said cocaine was then and there a compound, [4] manufacture, salt, derivative and preparation of cocoa leaves; and the said morphine and said cocaine were not then and there obtained from a registered dealer in pursuance of a prescription written for legitimate medical uses, issued by a physician, dentist, veterinary surgeon, or other practitioner registered under the said act; and the said six paper bags, ten small cardboard boxes, one small celluloid box and one small metal box containing the said morphine and said cocaine did not then and there bear the name and registry number of a druggist, serial number of a prescription, name and address of a patient, and name and registry number of the person in writing the said prescription; that the said morphine and cocaine were not then and there dispensed, administered or given away to a patient by a registered physician, dentist, veterinary surgeon, or other practitioner in the course of his professional practice, and a record kept of the said dispensation, administration and giving away of the said morphine and cocaine, as required by the said act.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the said United States.

ROBERT O'CONNOR,
United States Attorney.
GORDON LAWSON,
Assistant United States Attorney. [5]

[Endorsed]: No. 1847—Crim. United States District Court, Southern District of California, Southern Division. The United States of America vs. Harry Day, etc. Indictment—Viol. Act Feb. 24, 1919, amending Act Dec. 17, 1914. Harrison Narcotic Act. A true bill. John McPeak, Foreman. Filed Nov. 21, 1919. Chas. N. Williams, Clerk. By Maury Curtis, Deputy Clerk. Bail, $1,000.00 J. Robt. O'Connor. [6]

At a stated term, to wit, the July, A. D. 1919, term of the District Court of the United States, within and for the Southern Division of the Southern District of California, held at the courtroom thereof, in the city of Los Angeles, on Wednesday, the 26th day of November, in the year of our Lord one thousand nine hundred and nineteen. Present: The Honorable BENJAMIN F. BLEDSOE, District Judge.

No. 1847—CRIM.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HARRY DAY,

Defendant.

Minutes of Court—November 26, 1919—Arraignment and Plea.

This cause coming on this day for arraignment and entry of plea of the defendant herein, Gordon Lawson, Esq., Assistant United States Attorney, being

present in court as counsel for the plaintiff, the defendant being present in custody of the United States Marshal, with his attorney, R. J. Brown, and defendant having been called and arraigned and having stated his true name is Harry Dean, and having waived a formal reading of the indictment, and having been required to plead thereto, now on motion of Gordon Lawson, counsel for the plaintiff, it is by the Court ordered that this cause be and the same is hereby continued to December 1st, 1919, for the entry of plea and setting for trial. [7]

At a stated term, to wit, the July, A. D. 1919, term of the District Court of the United States, within and for the Southern Division of the Southern District of California, held at the courtroom thereof, in the city of Los Angeles, on Monday, the 1st day of December, in the year of our Lord one thousand nine hundred and nineteen. Present: The Honorable BENJAMIN F. BLEDSOE, District Judge.

No. 1847—CRIM. S. D.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HARRY DEAN, Indicted as HARRY DAY,

Defendant.

Minutes of Court—December 1, 1919—Order Consolidating Causes and Fixing Date of Trial.

This cause coming on at this time for the plea of defendant and for the setting of said cause down for trial; Gordon Lawson, Esq., Assistant U. S. Attorney, appearing as counsel for plaintiff, R. J. Brown, Esq., appearing as counsel for defendant; and defendant having been required to enter his plea herein, and having pleaded NOT GUILTY, which plea is ordered entered herein; now, on motion of Gordon Lawson, Esq., counsel for plaintiff, counsel for defendant consenting thereto, it is ordered that this cause, and cause No. 1813—Crim. S. D., United States of America, Plaintiff, vs. Harry Day, Defendant, be consolidated, and set for trial together, and that said cause be set down for trial on Wednesday, the 10th day of December, 1919. [8]

At a stated term, to wit, the July, A. D. 1919, term of the District Court of the United States, within and for the Southern Division of the Southern District of California, held at the courtroom thereof, in the city of Los Angeles, on Wednesday, the 10th day of December, in the year of our Lord one thousand nine hundred and nineteen. Present: The Honorable BENJAMIN F. BLEDSOE, District Judge.

CONSOLIDATED.

No. 1813—CRIM S. D.

No. 1847—CRIM. S. D.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HARRY DEAN,

Defendant.

Minutes of Court—December 10, 1919—Trial.

This consolidated cause coming on before the Court and a jury to be impaneled herein; and defendant being present with his counsel Warren Williams, Esq., and Gordon Lawson, Esq., Assistant U. S. Attorney, present for plaintiff, and counsel for both sides being now ready to proceed with the trial of this cause, and the Court having so ordered that the trial proceed, and that a jury of twelve (12) men be duly impaneled herein, and the following twelve (12) men having been duly drawn from the box, called and sworn on *voir dire,* to wit: Henry C. Bohrmann, Paul T. Wayne, Chas. W. Hardy, Lovell Swisher, Jr., Karl Klokke, E. J. Vawter, Jr., Edward A. Talbot, George R. Bentel, P. J. Beveridge, A. Sidney Jones, Frank Griffith, H. W. Keller, and the Indictment in each of said cases having been read to the jury, and the jury having been examined by the Court and passed for cause, and A. Sidney Jones, a petit juror herein, for cause shown, is now by the Court excused, and J. W. Montgomery, a petit juror having been called in the place of said juror so ex-

cused, and having been sworn on *voir dire,* examined by the Court and by counsel for respective parties, and passed for cause; and the plaintiff having [9] at this time exercised no peremptory challenges; and the following named petit jurors having been by the counsel for the defendant peremptorily challenged, to wit: Charles W. Hardy, Karl Klokke, E. J. Vawter, Jr., Edward A. Talbot and P. J. Beveridge, and as so challenged, said petit jurors excused by the Court; and the names of five (5) other petit jurors having been drawn from the box, called and sworn on *voir dire,* and examined by the Court and passed for cause, to wit: C. H. Lippincott, W. T. Selleck, J. S. Stotler, Ray R. Thomas, E. B. Rivers, and said five jurors having also been passed for cause by counsel for respective parties; and no peremptory challenges having been exercised by the plaintiff; and C. H. Lippincott, W. T. Selleck, J. S. Stotler, and Ray R. Thomas having been peremptorily challenged by the defendant, and by the Court excused.

And it appearing to the Court that from challenges and otherwise there is not a petit jury to determine this cause, it is thereupon by the Court ordered that a special venire of ten (10) jurors be drawn from the bystanders be issued herein, returnable at 2:00 o'clock P. M. of this day, to compete the panel in the causes entitled the United States of America, Plaintiff, vs. Harry Dean, Defendant, Nos. 1813 and 1847—Crim. Consolidated, for the purpose of trial; and

The Court at the hour of 11:30 o'clock A. M., having taken a recess until 2 o'clock P. M. of this day, and,

Now, at the hour of 2 o'clock P. M. of this date, the Court having reconvened and all the parties being present as before, and the U. S. Marshal having made his return of the special venire, heretofore issued herein, and the names of the special veniremen having been called and all having answered present, to wit: George S. Wilson, H. L. Hovey, C. H. Conrad, A. D. Patterson, Frank C. Wallace, E. D. Robinson, Thomas Strohm, J. A. Bothwell, J. M. Fix, and D. F. Brandt, the said special jurors having been sworn and having been examined [10] by the Court as to their qualifications and having been accepted by the Court as special jurors, and their names thereupon being placed in the jury-box, and the Court having ordered that four (4) names be drawn from the box and the names of George S. Wilson, H. L. Hovey, J. A. Bothwell and J. M. Fix having been drawn from the box, and the Court thereupon having read both of the indictments in the two cases now on trial and having examined the said four jurors for cause, and said jurors having been examined by counsel of the respective parties and passed for cause, and H. L. Hovey having been peremptorily challenged by Gordon Lawson, Esq., counsel for plaintiff, and excused; and George S. Wilson having been peremptorily challenged by Warren Williams, Esq., of counsel for the defendant, and excused; and the names of Thomas Strohm, E. D. Robinson having been duly drawn, and said jurors having been called and examined by the Court and counsel for respective parties for cause and passed for cause, and Thomas Strohm having been peremptorily challenged by Gordon Lawson,

Esq., counsel for the Government, and excused, and the name of C. H. Conrad having been drawn and said venireman called and examined by the Court and by counsel for respective parties for cause, and passed for cause, and said jurors now in the box having been accepted and duly sworn to try this cause, said jury being as follows, to wit:

(JURY)

1.	Henry C. Bohrmann	7.	E. B. Rivers,
2.	Paul T. Wayne,	8.	J. A. Bothwell,
3.	Lovell Swisher, Jr.,	9.	J. M. Fix,
4.	George R. Bentel,	10.	E. D. Robinson,
5.	Frank Griffith,	11.	C. H. Conrad,
6.	H. W. Keller,	12.	J. W. Montgomery.

and the Court having ordered that the trial of said causes be proceeded with and Gordon Lawson, Esq., Assistant U. S. Attorney, having waived an opening statement, and a motion of Warren Williams, Esq., counsel for defendant, as aforesaid, to exclude all witnesses from the courtroom except the witness [11] on the stand having been denied by the Court, to which ruling of the Court counsel for the defendant having requested that an exception be noted; and

Walter H. Austin, a witness for the plaintiff, having been duly called, sworn, and testifies for the United States, and the following exhibits on behalf of the plaintiff having been offered and filed in evidence as follows, to wit:

"U. S. Ex. 1—Tin box with loose tissue paper wrapper."

"U. S. Ex. 2—Scales in wooden case."

"U. S. Ex. 3—Shaving stick box and paper box."

"U. S. Ex. 4—Two tubes of tablets."

"U. S. Ex. 5—Small bottle white powder."

"U. S. Ex. 6—Hypodermic needle in box."

"U. S. Ex. 7—Small scales."

"U. S. Ex. 8—Small spoon."

"U. S. Ex. 9—Four (4) small pill boxes."

"U. S. Ex. 10—Small box labeled 'The Athens,' etc."

"U. S. Ex. 11—Four slips of paper," and,

Howard J. Brooks, being duly called, sworn and testifies for the United States; and,

Daisy G. Webb, being duly called, sworn and testifies for the United States; and

C. W. Montgomery, being duly called, sworn and testifies for the plaintiff; and the following exhibits on behalf of the plaintiff having been offered and filed in evidence as follows, to wit:

"U. S. Ex. 12—A large box of sundry articles."

"U. S. Ex. 13—A package of small pill boxes, and bundle of sundry articles, including a lady's purse, etc," and,

Now at the hour of 3:40 o'clock P. M. the Court having admonished the jury that during the progress of this case they are not to permit other persons to talk to them, nor themselves talk to other persons about this case, or anything connected with this case, and that, until said cause is finally given them for consideration under the instructions [12] of the Court, they are not to talk with each other about this case, or anything connected therewith; and

a recess having been taken for five (5) minutes, and thereafter at the hour of 3:45 o'clock P. M. the Court having reconvened, and counsel being present as before, and the shorthand reporter being present, and the jury all being present, and

C. W. Montgomery, a witness on behalf of the plaintiff, heretofore sworn, now resumes the stand, and having testified herein; and,

O. S. Kunzman, having been duly called, sworn and testifies for the United States; and,

T. F. O'Brien, having been called, sworn and having testified for the plaintiff herein; and,

Mrs. Anna Johnson, having been called, sworn and testified for the United States; and,

Arthur R. Maas, having been called, sworn, and testified herein for the plaintiff; and,

Now, at the hour of 4:05 o'clock P. M., the plaintiff having no further testimony to offer in evidence, thereupon rests.

And a motion of Warren Williams, Esq., counsel for defendant as aforesaid, for an instructed verdict of acquittal, having been denied by the Court, to which ruling of the Court, counsel for defendant having requested that an exception be noted; and,

Harry Dean, a witness for the defendant, having been called, sworn and testified for the defendant; and,

A motion having been made by Gordon Lawson, Esq., of counsel for plaintiff herein as aforesaid the Court ordered that Arthur R. Maas be permitted to temporarily withdraw U. S. Ex. 7 and two pair of

small scales included in box marked U. S. Ex. 12; and,

Now, at the hour of 4:50 o'clock P. M., the Court having given the jury the usual admonition, now takes a recess until 10 o'clock A. M., Thursday, December 11th, 1919. [13]

At a stated term, to wit, the July, A. D. 1919, term of the District Court of the United States, within and for the Southern Division of the Southern District of California, held at the courtroom thereof, in the city of Los Angeles, on Thursday, the 11th day of December, in the year of our Lord one thousand nine hundred and nineteen. Present: The Honorable BENJAMIN F. BLEDSOE, District Judge.

CONSOLIDATED.

No. 1813—CRIM. S. D.

No. 1847—CRIM. S. D.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HARRY DEAN,

Defendant.

Minutes of Court—December 11, 1919—Trial (Continued).

This consolidated cause, coming on before the Court and a jury heretofore impaneled for further trial; and defendant being present with his counsel,

Warren Williams, Esq., and Gordon Lawson, Esq., Assistant U. S. Attorney, present for the Government; and W. C. Wren, an official shorthand reporter, being present and acting as such; and the jury all being present; and it appearing that Warren Williams, Esq., attorney for defendant, is engaged in the impanelment of a jury in the Honorable Judge Trippet's court, at this time, it is ordered, at the hour of 10:35 o'clock A. M., that a recess be taken until the completion of that impanelment; and,

Now, at the hour of 11 o'clock A. M., the Court having reconvened, and all the parties being present as before; and

The defendant having no further testimony to offer in evidence, thereupon rests his case; and,

The plaintiff, having no rebuttal testimony to offer at this time, rests his case; and,

Warren L. Williams, Esq., attorney for defendant as aforesaid, having moved the Court for an instructed verdict of acquittal, which motion having been denied by the Court, to [14] which ruling of the Court counsel for defendant having requested that an exception be noted; and,

Gordon Lawson, Esq., Assistant U. S. Attorney, counsel for plaintiff, now makes opening argument on behalf of the plaintiff, and having concluded same; and Warren L. Williams, Esq., counsel for defendant, having argued in opposition thereto and having concluded same; and Gordon Lawson now makes his closing argument on behalf of the plaintiff, and having concluded the same, and,

The Court having given its instructions to the jury; and,

Warren L. Williams, Esq., counsel for defendant, having noted exceptions to all instructions, and having excepted to refusal of the Court to give defendant's requested instructions, and having excepted to comments of the Court on evidence and now at the hour of 12 o'clock Alfred Moore, a deputy U. S. Marshal, having been duly sworn as bailiff to take charge of the jury, and the jury having retired in charge of said sworn bailiff for consideration of their verdict, and thereafter, at the hour of 1 o'clock P. M., the jury having returned for further instructions; and defendant and counsel for both sides being present as before; and further instructions having been given; and now at the hour of 1:05 o'clock P. M., the jury having retired in charge of aforesaid sworn bailiff for further consideration of their verdict; and now, at the hour of 1:10 o'clock P. M., it is ordered that the jury be taken out to lunch in charge of said sworn bailiff, said lunch to be at the expense of the United States; and,

The Court at the hour of 1:10 o'clock P. M. of this date, having taken a recess until the incoming of the jury; and

Now, at the hour of 3 o'clock P. M. of this date, the Court having reconvened, and defendant and attorneys for [15] both parties being present as before, and the jury having returned into court, and having been requested to present their verdict in each of said causes, and said jurors through their foreman having presented their verdicts, which verdicts are read by

the clerk and by the Court ordered filed and entered herein; said verdicts, being as follows, to wit:

"In the District Court of the United States in and for the Southern District of California, Southern Division.

No. 1813—CRIM. S. D.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HARRY DEAN,

Defendant.

We, the jury in the above-entitled cause, find the defendant Harry Dean Guilty as charged in the first count of the indictment, and Guilty as charged in the second count of the Indictment.

Los Angeles, California, December 11, 1919.

J. M. FIX,
Foreman."

"In the District Court of the United States in and for the Southern District of California, Southern Division.

No. 1847—CRIM.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HARRY DEAN,

Defendant.

We, the jury, in the above-entitled case, find the defendant Harry Dean Guilty as charged in the Indictment. . . .

Los Angeles, California, December 11, 1919.

J. M. FIX,
Foreman."

And a motion having been made by Warren Williams, Esq., counsel for defendant, as aforesaid, this cause is continued to the hour of 1:30 o'clock P. M. of Wednesday, December 17th, 1919, for the imposing of sentence. [16]

In the District Court of the United States in and for the Southern District of California, Southern Division.

No. 1847—CRIM.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

HARRY DEAN,
Defendant.

Verdict.

We, the jury, in the above-entitled case, find the defendant, Harry Dean, guilty as charged in the indictment.

Los Angeles, California, Decem ber 11, 1919.

J. M. FIX,
Foreman.

[Endorsed]: No. 1847—Crim. United States District Court, Southern District of California, South-

ern Division. United States v. Harry Dean. Verdict. Filed Dec. 11, 1919. Chas. N. Williams, Clerk. By Maury Curtis, Deputy Clerk. [17]

At a stated term, to wit, the July, A. D. 1919, term of the District Court of the United States, within and for the Southern Division of the Southern District of California, held at the courtroom thereof, in the city of Los Angeles, on Tuesday, the 30th day of December, in the year of our Lord one thousand nine hundred and nineteen. Present: The Honorable BENJAMIN F. BLEDSOE, District Judge.

No. 1847—Crim. S. D.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HARRY DEAN,

Defendant.

Minutes of Court—December 30, 1919—Judgment.

This cause coming on at this time for the sentence of defendant, Gordon Lawson, Esq., Assistant U. S. Attorney, being present for the Government; Warren L. Williams, Esq., being present as attorney for the defendant, and defendant being present in custody of the U. S. Marshal, and a written statement by defendant having been read by his attorney, Warren L. Williams, Esq., the Court now pronounces judgment upon the defendant Harry Dean for the offense of which he now stands convicted, viz.: Viol.

Act of February 24th, 1919, amending Act of December 17th, 1914, known as the Harrison Narcotic Act. The judgment of the Court is that the defendant be imprisoned in the United States Penitentiary at McNeil Island, State of Washington, for the term and period of five (5) years, said term and period to begin at the expiration of the sentence imposed on said defendant on the second count of the Indictment in case No. 1813—Crim. S. D., United States of America, Plaintiff, vs. Harry Dean, Defendant. It is further ordered by the Court that the defendant be and he hereby is granted a ten (10) days' stay of execution. [18]

In the District Court of the United States of America, in and for the Southern District of California, Southern Division.

No. 1847—CRIM.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

HARRY DEAN,
Defendant.

Certificate of Clerk U. S. District Court to Transcript of Record.

I, Chas. N. Williams, Clerk of the District Court of the United States of America, in and for the Southern District of California, do hereby certify the foregoing sixty typewritten pages, numbered from 1 to 60, inclusive, and comprised in one

volume, to be a full, true and correct copy of the indictment, arraignment and plea, minutes of the trial, defendant's requested instructions, verdict, sentence and judgment of the Court, petition for writ of error, assignment of errors, order allowing writ of error, writ of error, citation on writ of error, praecipe and amended praecipe in the above and therein entitled action, and that the same together constitute the record in said action as specified in the said praecipe filed in my office on behalf of the plaintiff in error by his attorney of record.

I do further certify that the cost of the foregoing record is $16.05, the amount whereof has been paid me by the plaintiff in error herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, this 6th day of February, in the year of our Lord one thousand nine hundred and *twenty* [61] *our* Independence the one hundred and forty-fourth.

[Seal] CHAS. N. WILLIAMS,
Clerk of the District Court of the United States of America in and for the Southern District of California.

By R. S. Zimmerman,
Deputy Clerk. [62]

[Endorsed]: No. 3460. United States Circuit Court of Appeals for the Ninth Circuit. Harry Dean, Plaintiff in Error, vs. The United States of

America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Southern District of California, Southern Division.

Filed February 26, 1920.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

Upon Writ of Error to the United States District Court for the Southern District of California, Southern Division.

U. S. District Court—No. 1847—CRIMINAL.

HARRY DEAN,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Statement of Plaintiff in Error of Errors to be Relied Upon and Designation of Parts of Record Necessary to be Printed for Consideration Thereof, Under Section 8, of Rule 23, of Rules of United States Circuit Court of Appeals, Ninth Circuit.

To the Clerk of the United States Circuit Court of Appeals, Ninth Circuit.

Comes now Harry Dean, plaintiff in error, above named, and files the following statement and assignment of errors upon which he intends to rely, and of the parts of the Clerk's Transcript of Record which he thinks necessary for the proper consideration of said errors, to wit:

I.

The Court erred in rendering the judgment in this cause against the plaintiff in error for the reason that the indictment in said cause does not state facts sufficient to constitute a public offense, or any offense or crime against the laws or statutes of the United States of America, or the violation of any law or statute of the United States of America, whatsoever or at all.

And the plaintiff in error, Harry Dean, designates the following part of record as necessary to the consideration of said assignment of error and requests that said parts of the Clerk's Transcript of Record be printed, to wit:

Addresses and Names of Attorneys, Clerk's Transcript of Record, page 3.

Indictment, Clerk's Transcript of Record, page 4.

Arraignment and Plea of Plaintiff in Error, Clerk's Transcript of Record, page 7.

Arraignment and Plea of Plaintiff in Error, Clerk's Transcript of Record, page 8.

Clerk's Minutes of Trial, Clerk's Transcript of Record, pages 9–16, inc.

Verdict, Clerk's Transcript of Record, page 17.

Judgment, Clerk's Transcript of Record, page 18.

Clerk's Certificate to Transcript of Record, Clerk's Transcript of Record, page 61.

Writ of Error (Original), Clerk's Transcript of Records, I.

Citation on Writ of Error, Clerk's Transcript of Record, IV.

WARREN L. WILLIAMS,
SEYMOUR S. SILVERTON,
Attorneys for Plaintiff in Error.

[Endorsed]: No. 3460. United States Circuit Court of Appeals for the Ninth Circuit. Harry Dean, Plaintiff in Error, vs. United States of America, Defendant in Error.

Received copy of the within this 24th day of February, 1920.

GORDON LAWSON,
Asst. U. S. Atty.

In the District Court of the United States, in and for the Southern District of California, Southern Division.

No. 1847—CRIM.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HARRY DEAN,

Defendant.

Order Extending Time to and Including March 1, 1920, to File Record and Docket Cause.

Good cause appearing therefor, it is hereby ordered, that the defendant in the above-entitled cause, Harry Dean, may have to and including the first day of March, 1920, in which to docket and file the record of the above-entitled cause in the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California.

Dated at Los Angeles, California, February 4th, 1920.

BLEDSOE,
United States District Judge.

[Endorsed]: No. 3460. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to Mar. 1, 1920, to File Record Thereof and to Docket Case. Filed Feb. 5, 1920. F. D. Monckton, Clerk. Refiled Feb. 26, 1920. F. D. Monckton, Clerk.

No. 3460.

IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Harry Dean,
Plaintiff in Error,
vs.
The United States of America,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

Upon Writ of Error to the United States District Court, for the Southern District of California, Southern Division.

WARREN L. WILLIAMS,
SEYMOUR S. SILVERTON,
419 Ferguson Building, Los Angeles, Cal.,
Attorneys for Plaintiff in Error.

Parker & Stone Co., Law Printers, 232 New High St., Los Angeles, Cal.

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No. 3460.

IN THE

District Court of the United States

IN AND FOR THE

Southern District of California,

Southern Division.

Harry Dean,
Plaintiff in Error,
vs.
The United States of America,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

Plaintiff in error was proceeded against in the District Court of the Southern District of California, Southern Division, under an indictment purporting to charge him with a violation of the Harrison Narcotic Law, as amended. The indictment is in one count, and defendant below, plaintiff in error herein, was found guilty by a jury and thereafter sentenced by the Honorable Judge Benjamin F. Bledsoe, judge of the said District Court, to imprisonment at McNeil's Island, state of Washington, for a period of four (4) years, from which judgment he prosecutes this writ of error. This Honorable Court is requested to notice as a common error, the specification of error herein.

SPECIFICATIONS OF ERROR.

Plaintiff in error relies upon but one specification of error in the prosecution of his writ, to-wit:

The court erred in rendering judgment in this cause against the plaintiff in error for the reason that the indictment in said cause does not state facts sufficient to constitute a public offense, or any offense or crime against the laws or statutes of the United States of America, whatsoever or at all.

ARGUMENT.

The Said Indictment Does Not State Facts Sufficient to Constitute a Public Offense, or Any Offense or Crime Whatsoever Against the Laws or Statutes of the United States in That It Fails to Charge This Defendant With a Violation of the Harrison Narcotic Law as Amended, of Which He Was Found Guilty and Adjudged to Suffer Imprisonment.

It is necessary that a good indictment under this section charge a defendant with failing to pay the special tax required by said law, or said indictment must charge the defendant with dispensing drugs from receptacles containing the said drugs, which receptacles do not then and there bear and have affixed thereon appropriate tax-paid stamps, as required by the Harrison Narcotic Act.

This Honorable Court is familiar with the Harrison Narcotic Act as amended by the Act of February 24, 1919, and it is unnecessary to go further than to state

that the gist of the offense of violating the said act is the purchasing, selling, dispensing, distributing, etc., of drugs from packages or cartons which have not affixed thereon appropriate tax-paid stamps.

The indictment in said cause is as follows:

"INDICTMENT.

Viol. Act Feb. 24, 1919, Amending Act of Dec. 17, 1914, Harrison Narcotic Act.

At a stated term of said court, begun and holden at the city of Los Angeles, within the Southern Division of the Southern District of California, on the second Monday of July, in the year of our Lord one thousand nine hundred and nineteen;

The grand jurors of the United States of America, duly chosen, selected and sworn, within and for the division and district aforesaid, on their oath present:

That Harry Day, alias Harry Dean, alias Franklin P. Blair, whose full and true name other than as herein stated is to the grand jurors unknown, late of the Southern Division of the Southern District of California, heretofore, to-wit, on or about the 17th day of October, in the year of our Lord one thousand nine hundred and nineteen, at the city of Pasadena, county of Los Angeles, and within the state and Southern Division of the Southern District of California, and within the jurisdiction of this Honorable Court, did knowingly, wilfully, unlawfully and feloniously sell, dispense and distribute morphine and cocaine in and from six paper bags, ten small cardboard boxes, one small celluloid box and one small metal box, which said bags and boxes, and either and each of them, were not then and there the original stamped packages containing the said morphine and said cocaine; and the said morphine was then and there a compound,

manufacture, salt, derivative and preparation of opium, and the said cocaine was then and there a compound, (4) manufacture, salt, derivative and preparation of cocoa leaves; and the said morphine and said cocaine were not then and there obtained from a registered dealer in pursuance of a prescription written for legitimate medical uses, issued by a physician, dentist, veterinary surgeon, or other practitioner registered under the said act; and the said six paper bags, ten small cardboard boxes, one small celluloid box and one small metal box containing the said morphine and said cocaine did not then and there bear the name and registry number of a druggest, serial number of a prescription, name and address of a patient, and name and registry number of the person in writing the said prescription; that the said morphine and cocaine were not then and there dispensed, administered or given away to a patient by a registered physician, dentist, veterinary surgeon, or other practitioner in the course of his professional practice, and a record kept of the said dispensation, administration and giving away of the said morphine and cocaine, as required by the said act.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the said United States.

ROBERT O'CONNOR,
United States Attorney.
GORDON LAWSON,
Assistant United States Attorney.

(Endorsed): No. 1847 Crim. United States District Court, Southern District of California, Southern Division. The United States of America vs. Harry Day, etc. Indictment—Viol. Act Feb. 24, 1919, amending Act Dec. 17, 1914. Harrison Narcotic Act. A

true bill. John McPeak, foreman. Filed Nov. 21, 1919. Chas. N. Williams, clerk. By Maury Curtis, deputy clerk. Bail, $1,000.00. J. Robt. O'Connor."

The language germane hereto is as follows:
"did knowingly, wilfully, unlawfully and feloniously sell, dispense and distribute morphine and cocaine in six paper bags, ten small cardboard boxes, one small celluloid box, and one metal box, which said bags and boxes, and either and each of them, were not then and there the *original stamped packages* containing said morphine and said cocaine." (Italics are ours.)

It is true that the indictment charges that the package containing the said drug was not then and there the *original stamped package*, and it might be stated in this connection that this is the only language in the indictment which could be remotely urged as supplying the averment that the said receptacle purporting to contain the said drug, did not then and there have affixed thereto appropriate tax-paid stamps, but this averment is meaningless, and cannot supply the omission complained of. The term "original stamped package" can surely not be held by an ordinary person to be synonymous with a failure to pay the special tax required, nor could it be construed to denote the absence of tax-paid or revenue stamps upon the receptacle purporting to contain the drug. It might mean many things. We think it might be reasonably inferred to refer to the label or brand of the package, or the date of the purchase, stamped upon the said receptacle, or something along that line. It clearly fails to apprise the accused of the crime charged, to-

wit: That he failed to pay the special tax, as required, or to have tax-paid or revenue stamps affixed by the internal revenue commissioner to the said package.

Nor can such inference that the term "original stamped package" was intended to denote an absence of tax stamps from the carton or package, be indulged in. Direct averments are required in every indictment, and only those inferences can be drawn which the law itself draws. Inferences cannot be indulged in to make good an indictment lacking in averment, nor is the defect herein under consideration one which can be cured by the evidence or verdict. It is essential to every valid indictment that every fact necessary to charge a crime should be made the subject of direct averment and not left to inference.

We realize that section 1025 of the Revised Statutes provides that:

> "No indictment found and presented by a grand jury in any District or Circuit, or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant."

However, it is contended that the error herein complained of is not a mere matter of imperfection in form, or a defect in form, but that it tends to substantially prejudice the substantial rights of the defendant which are guaranteed to him, and under which he is entitled to be fully apprised of the exact charge

against him. A crime must be charged with due exactness.

In the case of *Knauer v. United States,* reported in 237 Federal Reporter at page 8, reading from page 12, a proposition of law relative to indictments is therein laid down, which proposition of law has been repeatedly reiterated and followed by the courts, and which is as follows:

> "Does the indictment contain a sufficient accusation of crime, and do its averments furnish the accused with such a description of the charge against them, as will enable them to make their defense and avail themselves of their conviction or acquittal for protection against future proceedings for the same offense?" (Citing authorities, parentheses are ours.)

The principle is not that the evidence subsequently taken may show his guilt, but that there was no proper procedure before the court to justify the taking of that evidence.

In conclusion, it is respectfully urged that the said indictment does not state facts sufficient to constitute a public offense, or any offense or crime against the laws or statutes of the United States of America, or a violation of any law or statute of the United States of America, in the particular heretofore urged, and that the judgment be reversed.

Respectfully submitted,
WARREN L. WILLIAMS,
SEYMOUR S. SILVERTON,
Attorneys for Plaintiff in Error.

No. 3460.

IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Harry Dean,
Plaintiff in Error,
vs.
The United States of America,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

ARGUMENT.

The only point raised is stated by plaintiff in error on page four of his brief, as follows:

"The said indictment does not state facts sufficient to constitute a public offense, or any offense or crime whatsoever against the laws or statutes of the United States, in that it fails to charge this defendant with a violation of the Harrison Narcotic Law as amended, of which he was found guilty and adjudged to suffer imprisonment."

The indictment in this case charges an offense under the Harrison Narcotic Act, as amended February 24th, 1919, and particularly section one thereof, 40 Statutes

at Large, chapter 18, page 1057, at page 1131, which provides:

> "It shall be unlawful for any person to purchase, sell, dispense or distribute any of the aforesaid drugs except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be *prima facie* evidence of the violation of this section by the person in whose possession same may be found."

The argument of plaintiff in error is to the effect that the indictment, Transcript of Record, pages 5 and 6, by following the statutory language, and particularly that part of it describing the containers of narcotics, "the original stamped packages," was not a sufficient averment, and that the substantial rights of the plaintiff in error were prejudiced in that he was not fully apprised of the nature of the charge preferred against him.

The defendant in error cannot help but feel that the argument of plaintiff in error in respect to the meaning of the statutory language "original stamped packages," especially when construed by the context of the indictment, is somewhat captious, and defendant in error is content to rest the argument on a comparison of the statute itself and a reading of the indictment. [Transcript of Record, pages 5 and 6.]

Respectfully submitted,

ROBERT O'CONNOR,
United States Attorney,
GORDON LAWSON,
Assistant United States Attorney.

No. 3460.

IN THE

United States Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Harry Dean,
Plaintiff in Error,
vs.
The United States of America,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

ROBERT O'CONNOR,
United States Attorney,
GORDON LAWSON,
Assistant United States Attorney.

Parker & Stone Co., Law Printers, 232 New High St., Los Angeles, Cal.

No. 3462

United States

Circuit Court of Appeals

For the Ninth Circuit.

NG FUNG HO, Otherwise Known as UNG KIP, NG YUEN SHEW; LUI YEE LAU, Otherwise Referred to as LOUIE PON; GIM SANG GET and GIM SANG MO,

Appellants,

vs.

EDWARD WHITE, as Commissioner of Immigration for the Port of San Francisco,

Appellee.

Transcript of Record.

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 3462

United States

Circuit Court of Appeals

For the Ninth Circuit.

NG FUNG HO, Otherwise Known as UNG KIP, NG YUEN SHEW; LUI YEE LAU, Otherwise Referred to as LOUIE PON; GIM SANG GET and GIM SANG MO,

Appellants,

vs.

EDWARD WHITE, as Commissioner of Immigration for the Port of San Francisco,

Appellee.

Transcript of Record.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

For Petitioners and Appellants:

GEO. A. McGOWAN, Esquire, San Francisco, Calif.

For Respondent and Appellee:

BEN F. GEIS, Esq., Asst. U. S. Attorney, S. F., Cal.

In the Southern Division of the District Court of the United States, for the Northern District of California, First Division.

#16,500.

In the Matter of the Application of NG FUNG HO, Otherwise Known as UNG KIP; NG YUEN SHEW; LUI YEE LAU, Otherwise Referred to as LOUIE PON; GIN SANG GET and GIN SANG MO, on Habeas Corpus.

Praecipe for Transcript on Appeal.

To the Clerk of said Court:

Sir: Please make up Transcript of Appeal in the above-entitled case, to be composed of the following papers, to wit:

1. Petition for Writ of Habeas Corpus.
2. Order to Show Cause and Releasing on Bond.
3. Writ of Habeas Corpus.
4. Return to Writ of Habeas Corpus.
5. Minute Order Submitting Case.
6. Memorandum Opinion and Judgment.
7. Notice of Appeal.
8. Petition for Appeal.
9. Assignment of Errors.

10. Order Allowing Appeal.
11. Stipulation and Order Respecting Immigration Records.
12. Citation on Appeal.

—together with the Certificate of the Clerk attesting the said Record.

Dated, San Francisco, Cal., December 24th, 1919.

GEO. A. McGOWAN,
Attorney for Petitioners and Appellants.

[Endorsed]: Filed Jan. 26, 1920. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [1*]

In the Southern Division of the District Court of the United States in and for the Northern District of California, First Division.

16,500.

In the Matter of the Application of NG FUNG HO, Otherwise Known as UNG KIP; NG YUEN SHEW; LUI YEE LAU; Otherwise Referred to as LOUIE PON; GIN SANG GET and GIN SANG MO, on Habeas Corpus.

Petition for Writ of Habeas Corpus.

To the Honorable, the United States District Judge now Presiding in the Above-entitled Court:

It is respectfully shown by the petition of the undersigned that Ng Fung Ho, otherwise known as Ung Kip, Ng Yuen Shew, Lui Yee Lau, otherwise referred to as Louie Pon, Gin Sang Get and Gin Sang Mo, hereinafter referred to as the detained, are unlawfully imprisoned, detained, confined and re-

*Page-number appearing at foot of page of original certified Transcript of Record.

strained of their liberty under the order of and by the direction of the Secretary of the Department of Labor by Edward White, Commissioner of Immigration for the port of San Francisco, or by his subordinates, under his direction, within the State and Northern District of California, Southern Division thereof. That the said imprisonment, detention, confinement and restraint is illegal, and that the illegality thereof consists in this, to wit:

That it is claimed by the said Secretary and the said Commissioner that the detained are alien Chinese persons, who have been found within the United States in violation of the provisions of a law of the United States, to wit, the Chinese exclusion or restriction laws or acts, and that they were therefore subject to be taken into custody and returned to the country whence they came under the General Immigration laws of the United States of [2] America.

That the said Commissioner now holds the said detained in custody under warrants of deportation of the said Secretary of Labor, copies of which are hereunto annexed and marked Exhibit "A," within the State and Northern District of California, Southern Division thereof, and it is the purpose and intention of the said Commissioner to execute the said warrants of deportation by causing the detained to be deported upon the SS. "Nanking" sailing from the port of San Francisco, at 1:00 o'clock P. M. on February 15th, 1919, and unless this court intervene the said detained will be carried away from their domicile within the United States and deprived of their rights, as in this petition hereinafter expressly set forth.

Your petitioner alleges that the detained do not come within the restrictions or provisions of said Immigration Act; but on the contrary, your petitioner alleges that the action of the Secretary of Labor in issuing the said warrants of deportation and each of them was and is in excess of and in violation of the authority conferred upon him in said Act of Congress of February 5, 1917; generally known as the General Immigration Act, and was and is in transgression of one of the sections therein contained, that is to say: that in section 38 of said General Immigration Act of February 5, 1917, there are contained provisions in the words and figures following, to wit:

> "Sec. 38. That this act, except as otherwise provided in section three, shall take effect and be enforced on and after May first, nineteen hundred and seventeen. * * * PROVIDED FURTHER, That nothing contained in this act shall be construed to affect any prosecution, suit, action or proceedings brought, or any act, thing or matter, civil or criminal, done or existing at the time of the taking effect of this act, except as mentioned in the third proviso of section nineteen hereof; but as to all such prosecutions, suits, actions, proceedings, acts, things or matters the laws or parts of laws repealed or amended by this act are hereby continued in force and effect." [3]

Your petitioner further alleges that it appears from the warrant of deportation of the detained Ng Fung Ho, otherwise known as Ung Kip, which said

warrant is numbered in the records and files of said Secretary of Labor 54267/51, as follows, to wit:

> "who landed at the port of San Francisco, Cal., ex SS. 'Manchuria,' on the 20th day of July, 1915, is subject to be returned to the country whence he came under section 19 of the immigration act of February 5, 1917, being subject to deportation, under the provisions of a law of the United States, to wit, the Chinese Exclusion laws, in that he has been found within the United States in violation of section 6, Chinese Exclusion Act of May 5, 1892, as amended by the act of November 3, 1893, being a Chinese laborer not in possession of a certificate of residence; he re-entered the United States in violation of section 7, Chinese Exclusion Act of September 13, 1888, being a Chinese laborer who failed to produce to the proper officer the return certificate required by said section; and he has been found in the United States in violation of section 2, Chinese Exclusion Act of November 3, 1893, having secured admission by fraud, not having been at the time of his entry a lawfully domiciled exempt returning to resume a lawfully acquired domicile and to follow an exempt pursuit in this country."

Your petitioner further alleges that it appears from the warrant of deportation of the detained Ng Yuen Shew, which said warrant is numbered in the records and files of said Secretary of Labor 54267/51, as follows, to wit:

"who landed at the port of San Francisco, Cal., ex SS. 'Manchuria' on the 20th day of July, 1915, is subject to be returned to the country whence he came under section 19 of the immigration act of February 5, 1917, being subject to deportation under the provisions of a law of the United States, to wit, the Chinese exclusion laws, in that he has been found within the United States in violation of section 6, Chinese Exclusion Act of May 5, 1892, as amended by the act of November 3, 1893, being a Chinese laborer not in possession of a certificate of residence; and he has been found within the United States in violation of rule 9, Chinese rules, and of the Supreme Court decision on which such rule is based, having secured admission by fraud, not having been at the time of his entry the minor son of a member of the exempt classes."

Your petitioner further alleges that it appears from the warrant of deportation of the detained Lui Yee Lau, otherwise referred to as Louie Pon, which said warrant is numbered in the records and files of said Secretary of Labor 54372/2, as follows, [4] to wit:

"who landed at the port of Seattle, Washington, ex SS. 'Yokohama Maru,' on the 15th day of April, 1916, is subject to be returned to the country whence he came under section 19 of the immigration act of February 5, 1917, being subject to deportation under the provisions of a law of the United States, to wit, the Chinese ex-

clusion law, in that: He has been found within the United States in violation of section 6, Chinese Exclusion Act of May 5, 1892, as amended by the act of November 3, 1893, being a Chinese laborer not in possession of a certificate of residence; and he has been found within the United States in violation of section 6, Chinese Exclusion Act of July 5, 1884, having secured admission on a certificate issued under said section, but having become a laborer since admission."

Your petitioner further alleges that it appears from the warrant of deportation of the detained Gin Sang Get, which said warrant is numbered in the records and files of said Secretary of Labor 54267/57, as follows, to wit:

"who landed at the port of San Francisco, Cal., ex SS. 'China' on the 24th day of July, 1916, is subject to be returned to the country whence he came under section 19 of the immigration act of February 5, 1917, being subject to deportation under the provisions of a law of the United States, to wit, the Chinese exclusion laws, in that: He has been found within the United States in violation of section 6, Chinese Exclusion Act of May 5, 1892, as amended by the act of November 3, 1893, being a Chinese laborer not in possession of a certificate of residence."

Your petitioner further alleges that it appears from the warrant of deportation of the detained Gin Sang Mo, which said warrant is numbered in the rec-

ords and files of said Secretary of Labor 54267/57, as follows, to wit:

> "who landed at the port of San Francisco, Cal., ex SS. 'Shinyo Maru,' on the 28th day of April, 1917, is subject to be returned to the country whence he came under section 19 of the immigration act of February 5, 1917, being subject to deportation under the provisions of the law of the United States, to wit, the Chinese exclusion laws in that: He has been found within the United States in violation of section 6, Chinese Exclusion Act of May 5, 1892, as amended by the act of November 3d, 1893, being a Chinese laborer not in possession of a certificate." [5]

And your petitioner therefore alleges that it is affirmatively shown upon the face of each of said warrants of deportation that the action of the Secretary of Labor in ordering each of the said detained persons deported away from and out of the United States under and in pursuance of the terms of the said General Immigration Act which became effective May 1, 1917, was for an act, thing or matter which had been done or performed prior to the said 1st day of May, 1917, and that for said reason the said action of the said Secretary in attempting to deport out of and away from the United States the said detained Chinese persons for an act, thing or matter which had been done or performed prior to the 1st day of May, 1917, was in excess and in violation of the authority conferred upon the said Secretary and in violation of the said restriction contained in said section 38 of said General Immigration law hereinbefore set

forth, and that for said reason the action of the said secretary in issuing the said warrants of deportation and each of them was and is in excess of his jurisdiction and without the authority conferred upon him by the statute in such cases made and provided.

Your petitioner further alleges that the said detained and each of them do not come within the restrictions or provisions of the said General Immigration law, as charged in said warrants, but on the contrary, your petitioner alleges that the finding of the said Secretary of Labor in each of said cases that the said detained persons violated the said Chinese exclusion and restriction acts, as in each of said warrants of deportation set forth, was in excess of the jurisdiction, powers and authority of the said Secretary, and particularly in violation of the terms and provisions of the acts of Congress of May 6, 1882, July 5, 1884, November 3d, 1893, and April 29th, 1902, as amended and re-enacted by section 5 of the Deficiency Act of April 7th, 1904, which [6] said acts are commonly known and referred to as the Chinese exclusion or restriction acts, which said acts provide that Chinese persons found unlawfully within the United States shall be arrested and accorded a trial before a United States Justice, judge or commissioner, and that the said Secretary of Labor is not one of the judicial officers enumerated in said acts, as having authority to determine the question of the legality or illegality of the residence of Chinese persons charged with being illegally within the United States in violation of said Chinese exclu-

sion or restriction acts hereinbefore enumerated. And your petitioner therefore alleges that the action of the said Secretary of Labor in assuming jurisdiction of the said detained and each of them, and in issuing the warrants of deportation and in each of them, acted in violation of the provisions of the concluding section of the said General Immigration Act hereinbefore mentioned.

Your petitioners further allege upon their information and belief that the alleged hearings and each, every and all of them, upon which and as a result of which the said warrants of deportation were issued by the Secretary of Labor, the Assistant Secretary of Labor or the Acting Secretary of Labor, as the case may be, were and each of said hearings are unfair in this, that there was not evidence in said hearings or any of them to sustain the conclusions and findings of the said Secretary of Labor, Assistant Secretary of Labor or Acting Secretary of Labor, as the case may be, that the detained are Chinese aliens who entered the United States or re-entered the United States, in violation of the said Chinese exclusion or restriction acts, or whose subsequent residence within the United States was in violation thereof, or that they or any of them, the said detained, had practiced fraud or had fraud been practiced upon their behalf or on behalf of each or any of them, in the matter of their admission to the [7] United States, or that they or any of them had gained admission to the United States by means of false and misleading statements, or that they or any of them had entered without inspection, or were per-

sons likely to become public charges at the time of their entry, respectively, to the United States, in violation of the said Chinese exclusion or restriction acts or the said General Immigration Act, and all such said charges are makeweights unsupported by the evidence and in violation thereof and said conclusions or findings of the said Secretary of Labor, Assistant Secretary of Labor, or Acting Secretary of Labor, as the case may be, rest upon conjecture and suspicion and not upon evidence, and that there was no substantial or other evidence to sustain or support the said orders of deportation or any of them, so made as aforesaid, nor had the said Secretary of Labor, Assistant Secretary of Labor, or the Acting Secretary of Labor jurisdiction in the premises, and for each of said reasons the said orders or warrants of deportation and each of them, are in excess of the statutory authority of the officer issuing same, and that his said action in so doing was arbitrary and unfair and therefore subject to judicial review.

That your petitioners are in custody of an officer of the said Commissioner of Immigration, and subject to his restraint, but are permitted to verify this petition upon their own behalf and upon behalf of each of them.

That your petitioners have not in their possession or under their control any copy of the hearings or proceedings hereinbefore mentioned, save the warrants or orders of deportation hereinbefore mentioned and hereunto annexed and marked as exhibit "A" as aforesaid. Your petitioners allege,

however, that upon the production of the Immigration Records by the respondent, they do stipulate that the said records may be considered with the same force and effect as if filed with this petition and as exhibits in support and explanation thereof. [8]

That a former application for a writ of habeas corpus was presented in three separate cases upon behalf of different of your petitioners, but that the point herein made was not advanced in any of said petitions, and that the appeals taken from the orders denying said petitions were dismissed by consent of counsel for the respective parties thereto, so that the points herein advanced might be adjudicated. During the pendency of the said former habeas corpus proceedings the detained were each released upon bond in the sum of $1,000, and during the pendency of the proceedings before the said officials of the Department of Labor the said detained were each released upon bond.

WHEREFORE, your petitioners pray that a writ of habeas corpus issue herein, as prayed for, directed to the said Commissioner commanding him to produce the bodies of the said detained together with the time and cause of their detention, before your Honor at a time and place to be therein specified, to the end that the cause of the detention of the said detained may be enquired into, that they may be relieved of restraint and that they may be discharged from custody and go forth without day.

Dated, San Francisco, Cal., January 27th, 1919.

(Chinese Char.) NG FUNG HO,
(Chinese Char.) NG YUEN SHEW,
LUI YEE LAU,
GIN SANG GET,
GIN SANG HO,
Petitioners,

GEO. A. McGOWAN,
Attorney for Petitioners, Bank of Italy Building, Montgomery and Clay Streets, San Francisco, California. [9]

State and Northern District of California,
City and County of San Francisco,—ss.

Ng Fung Ho, Ng Yuen Shew, Lui Yee Lau, Gin Sang Get and Gin Sang Mo, being first sworn upon oath, each for himself and not one for the other, do depose and say:

That they are the petitioners named in the foregoing petition; that the same has been read and explained to them and that they know the contents thereof; and that the same is true of their own knowledge except as to those matters which are therein stated on their information and belief, and as to those matters they believe it to be true.

(Chinese Char.) NG FUNG HO.
(Chinese Char.) NG YUEN SHEW.
LUI YEE LAU.
GIN SANG GET.
GIN SANG MO.

Subscribed and sworn to before me this 27th day of January, 1919.

[Seal] C. M. TAYLOR,

Deputy Clerk, U. S. District Court, Northern District of California.

[Here follows Exhibit "A"—Warrants of Deportation.] [10]

[Endorsed]: Service of the within petition and the order to show cause and releasing upon bail, issued thereon, are hereby admitted and receipt of copies thereof are hereby admitted this 27th day of January, 1919.

BEN F. GEIS,

Asst. United States Attorney.

P. A. ROBBINS,

For the Commissioner of Immigration for the Port of San Francisco, Cal.

Filed Jan. 27, 1919. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [11]

In the Southern Division of the District Court of the United States, in and for the Northern District of California, First Division.

#16,500.

In the Matter of the Application of NG FUNG HO, Otherwise Known as UNG KIP; NG YUEN SHEW, LUI YEE LAU, Otherwise Referred to as LOUIE PON, GIN SANG GET and GIN SANG MO, on Habeas Corpus.

Order to Show Cause and Releasing upon Bail.

Good cause appearing therefor and upon reading the verified petition on file herein, it is hereby ordered that Edward White, Commissioner of Immigration for the Port and District of San Francisco, appear before this Court on the 29th day of January, 1919, at the hour of ten o'clock A. M. of said day, to show cause, if any he has, why a writ of habeas corpus should not issue herein as prayed for; and that a copy of this order be served upon said commissioner, and a copy of said petition upon the United States Attorney.

And it is further ordered that the said Edward White, Commissioner of Immigration as aforesaid, or whoever acting under the orders of the said commissioner, or the Secretary or Labor, shall have the custody of the said detained herein, are hereby ordered and directed to retain the said detained persons within the jurisdiction of this court until its further order herein.

And it is further ordered, that the said detained may each be released upon bond during the further proceedings to be had herein upon each individually giving a bond in the sum of $1,000, the said sum being the same amount fixed in the prior habeas corpus proceedings mentioned in the petition herein, and the United States marshal for this District is hereby authorized to take the said detained persons and each of them into his custody for the purpose of effecting their release upon bond as herein pro-

vided. Said bonds to be furnished by a surety company.

Dated, San Francisco, Cal., January 27th, 1919.

M. T. DOOLING,
United States District Judge.

[Endorsed]: Filed Jan. 27, 1919. W. B. Maling, Clerk. C. M. Taylor, Deputy Clerk. [12]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 16,500.

In the Matter of NG FUNG HO, Alias UNG KIP, NG YUEN SHEW, LUI YEE LAU, Alias LOUIE PON, GIN SANG GET and GIN SANG MO, on Habeas Corpus.

Writ of Habeas Corpus.

The President of the United States of America, to the Commissioner of Immigration, Port of San Francisco, Calif., Angel Island, Calif., GREETING:

YOU ARE HEREBY COMMANDED that you have the bodies of the said persons by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention by whatsoever names the said persons shall be called or charged before the Honorable Maurice T. Dooling, Judge of the United States District Court for the Northern District of California, at the court-

room of said court, in the City and County of San Francisco, California, on the 15th day of February, A. D. 1919, at 10 o'clock A. M. to do and receive what shall then and there be considered in the premises.

AND HAVE YOU THEN AND THERE THIS WRIT.

WITNESS, the Honorable MAURICE T. DOOLING, Judge of the said District Court, and the seal thereof, at San Francisco, in said District, on the 8th day of February, A. D. 1919.

[Seal] WALTER B. MALING,
Clerk.
By C. W. Calbreath,
Deputy Clerk. [13]

Return on Service of Writ.

United States of America,
Northern District of California,—ss.

I hereby certify and return that I served the annexed writ of habeas corpus on the therein named Edward White, Commissioner of Immigration, by handing to and leaving a true and correct copy thereof with Edward White, Commmissioner of Immigration, personally at San Francisco, in said District, on the 10th day of February, A. D. 1919.

J. B. HOLOHAN,
U. S. Marshal.
By Geo. H. Burnham,
Deputy.

[Endorsed]: Filed Feb. 14, 1919. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [14]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 16,500.

In the Matter of NG FUNG HO, Otherwise Known as UNG KIP, NG YUEN SHEW, LUI YEE LAU, Otherwise Referred to as LOUIE PON, GIN SANG GET and GIN SANG MO, on Habeas Corpus.

Return to Writ of Habeas Corpus.

Comes now Edward White, Commissioner of Immigration at the Port of San Francisco, by P. A. Robbins, Immigration Inspector, and in return to said petition for a writ of habeas corpus, admits, denies and alleges as follows:

I.

DENIES that Ng Fung Ho, otherwise known as Ung Kip, or Ng Yuen Shew, or Lui Yee Lau, otherwise referred to as Louie Pon, or Gin Sang Get, or Gin Sang Mo, or either or any of them, are unlawfully imprisoned, detained, confined and restrained, or unlawfully imprisoned, or detained, or confined, or restrained of their liberty under the order of and by, or under the order of, or by, the direction of the Secretary of the Department of Labor by Edward White, Commissioner of Immigration for the Port of San Francisco, or by his subordinates, or either of them, or by any person or persons whatever within the State and Northern

District of California, Southern District thereof, or elsewhere, or at all.

II.

DENIES that the alleged imprisonment, or detention, [15] or confinement, or restraint, is illegal and particularly in respect to the matter and things alleged in the petition herein, as constituting the illegality, or either or any of them.

III.

DENIES that the said detained, or either or any of them, will be deprived of their rights, or of any right by being deported under or pursuant to said alleged warrants, and in this connection alleges the fact to be that the said detained and each of them were arrested for a violation of the laws respecting the entry of alien Chinese into the United States under and pursuant to a warrant of the Secretary of Labor of the United States, duly and regularly issued and served upon the detained and each of them; that thereafter and heretofore, said detained and each of them were given a full and fair hearing before an Immigrant Inspector, as provided by law; that the said detained and each of them were thereafter and heretofore ordered deported by the said Secretary of Labor, Assistant Secretary of Labor, Acting Secretary of Labor, by warrants duly and regularly issued, as shown by the record of and in the several cases of the said detained; that all the said proceedings, orders and warrants were had, made and issued as provided by and in conformity with the laws, rules and regulations in such cases made and provided.

IV.

DENIES that the action of the Secretary of Labor in issuing the warrants of deportation, or either, or any of them, was or is in excess of, or in violation of the authority conferred upon him by said Act of Congress of February 5, 1917, generally known as the General Immigration Act, or was, or is, [16] in transgression of section 38, or any section of said Act of February 5, 1917, and in this connection alleges the fact to be that the said detained persons, prior to, and at the time of their arrest, were subject to arrest and deportation under and pursuant to the provisions of the said Act of Congress of February 5, 1917, and particularly under and pursuant to the provisions of sections 19 and 38 of said Act, said sections being in part as follows:

Section 19 of said Act provides:

> "That at any time within five years after entry, any alien who shall have entered or shall be found in the United States in violation of any of the laws of the United States, shall, upon the warrant of the Secretary of Labor, be taken into custody and deported. PROVIDED, FURTHER, that the provisions of this section, with the exceptions hereinbefore noted, shall be applicable to the classes of aliens therein mentioned, irrespective of the time of their entry into the United States."

Section 38 provides:

> "That this act, except as otherwise provided, in Section 3, shall take effect and be in force on and after May 1, 1917. * * * PROVIDED,

that this act shall not be construed to repeal, alter, or amend existing laws relating to the Immigration or exclusion of Chinese persons, or persons of Chinese descent, EXCEPT AS PROVIDED IN SECTION 19 HEREOF. * * * PROVIDED, FURTHER, that nothing contained in this act shall be construed to affect any prosecution, suit, action, or proceedings brought, or any act, thing or matter civil or criminal, done, or existing at the time of the taking effect of this act, EXCEPT AS MENTIONED IN THE THIRD PROVISO OF SECTION 19 HEREOF."

V.

DENIES that the action of the said Secretary in attempting to deport out of, or away from, the United States, the said detained persons for an act or thing, or matter, which had been done, or performed, prior to the first day of May, 1917, was in excess or in violation of the authority conferred upon the said Secretary, or in violation of said [17] Section 38 of said General Immigration Act, or of any part thereof of said Section, or of said Act, and in this connection alleges the fact to be that the action of the said Secretary of Labor, in issuing his warrant of deportation for the deportation of said detained and each of them, was within the power and authority conferred upon the said Secretary under and pursuant to the said General Immigration Laws and the then existing laws of the United States in such cases made and provided.

VI.

DENIES that the action of the said Secretary, or either of them, in issuing the said warrants of deportation, or either or any of them, was or is in excess of his jurisdiction or without the authority conferred upon him by the statutes in such cases made and provided.

VII.

DENIES that the detained, or either or any of them, do not come within the restrictions and provisions of the said General Immigration Law, as charged in said warrants, but allege the fact to be that each of the detained come within the restrictions and provisions of the said General Immigration Laws, as charged in the said warrants.

VIII.

DENIES that the finding of the said Secretary of Labor in each or any of said cases, that the said detained persons violated the Chinese Exclusion and Restriction Acts, as in each of said warrants of deportation set forth, was in excess of the jurisdiction, powers or authority of the said Secretary, or in violation of the terms, or provision of the acts of Congress of May 6, 1882, or July 5, 1884, or November 3, 1893, or April 29, 1902, or any of said Acts [18] as amended and re-enacted, or amended, or re-enacted by Section 5 of the Deficiency Act of April 7, 1904, commonly known and referred to as the Chinese Exclusion or Restriction Acts.

IX.

DENIES that the action of the said Secretary of Labor, in assuming jurisdiction of the said detained,

or either or any of them, or in issuing the warrants of deportation, or in either or any of them, acted in violation of the provisions of the concluding section or any section of the General Immigration Act hereinbefore mentioned.

X.

DENIES that the hearings, or either or any of them, upon, or as a result of which said, or either of said warrants of deportation were issued by the Secretary of Labor, or the Assistant Secretary of Labor, or the Acting Secretary of Labor, were, or are, unfair, in any way whatever, but alleges the fact to be that the said hearings and each of them were and are in all respects manifestly fair and impartial.

XI.

DENIES that there was no evidence in said hearings and in each of said hearings to sustain the conclusions and findings, or conclusions, or findings, of the Secretary of Labor and Assistant Secretary of Labor and Acting Secretary of Labor, or either, or any of them, that the detained are Chinese aliens who entered the United States, or re-entered the United States in violation of the said Chinese Exclusion and Restriction Acts, and whose subsequent residence within the United States was in violation thereof, and that they, and each of them, the said detained, had practiced fraud, and had fraud practiced upon their behalf, and on behalf [19] of each of them in the matter of their admission to the United States, and that they, and each of them, had gained admission to the United States by means of false and

misleading statements, and that they, and each of them, had entered without inspection, and were persons likely to become public charges at the time of their entry to the United States in violation of the said Chinese Exclusion and Restriction Acts, and the said General Immigration Act.

XII.

DENIES that all or any of said charges are makeweights or unsupported by the evidence, or in violation thereof, or that said conclusions, or any of them, or findings, of any of them, of the said Secretary of Labor, Assistant Secretary of Labor, or Acting Secretary of Labor, or either or any of them, rest upon conjecture, or suspicion, or are not supported by evidence.

XIII.

DENIES that there was no substantial evidence, or other evidence to sustain and support the said orders of deportation and each of them, and DENIES that the Secretary of Labor and Assistant Secretary of Labor and the Acting Secretary of Labor did not have jurisdiction in the premises, and DENIES that the said orders or warrants of deportation, or either or any of them, are in excess of the statutory authority of the officer issuing them, or that his, or either of their said action in so doing was arbitrary or unfair, or subject to judicial review, and in this connection alleges the fact to be that there was evidence in said hearings, and each of them, to sustain the findings and conclusions of the Secretary of Labor, Assistant Secretary of Labor and Acting Secretary of Labor, as the case may be, [20] that

the detained and each of them are Chinese aliens who entered the United States, or re-entered the United States in violation of the said Chinese Exclusion or Restriction Acts and whose subsequent residence within the United States was in violation thereof, and that they and each of the said detained had practiced fraud and had fraud practiced on behalf of each of them in the matter of their admission to and into the United States, and that they and each of them had gained admission to the United States by means of false, fraudulent and misleading statements and that they and each of them had entered without inspection and were persons likely to become public charges at the time of their entry, respectively, to the United States, in violation of the said Chinese Exclusion and Restriction Acts, and the said General Immigration Act; that the findings and conclusions of said Secretary of Labor, Assistant Secretary and Acting Secretary of Labor, and of each of them, is sustained and supported by the evidence; that the orders of deportation and each of them are supported and fully sustained by competent, substantial and sufficient evidence that the said Secretary of Labor, Assistant Secretary of Labor and Acting Secretary of Labor, and each of them, when acting, respectively had full power, authority and jurisdiction in the premises to so act; that the orders and warrants of deportation and each of them were within the power, jurisdiction and statutory authority of the said officers issuing them, respectively, and that in the exercise of the said power and authority they and each of them

acted within and under the authority, conferred upon them and each of them by law, and the said officers did not, nor did either of them, in the exercise of their said authority act arbitrarily, but acted with fairness, impartiality and within the [21] discretion conferred upon them and each of them by the law in such cases made and provided.

WHEREFORE, respondent prays that the said petition be denied and said Ng Fung Ho, otherwise known as Ung Kip; Ng Yuen Shew; Lui Yee Lau; otherwise referred to as Louie Pon; Gin Sang Get and Gin Sang Mo be remanded to the custody of respondent for deportation and for such other and further relief as this Court seems equitable and just.

ANNETTE ABBOTT ADAMS,
United States Attorney.
BEN F. GEIS,
Asst. United States Attorney. [22]

United States of America,
Northern District of California.
City and County of San Francisco,—ss.

P. A. Robbins, being first duly sworn, deposes and says: That he is a Chinese and Immigrant Inspector connected with the Immigration Service for the Port of San Francisco, and has been specially directed to appear for and represent the respondent, Edward White, Commissioner of Immigration, in the within entitled matter; that he is familiar with all the facts set forth in the within return to the writ of habeas corpus and knows the contents thereof; that it is impossible for the said Edward White to appear in person or to give his attention to said matter; that

of affiant's knowledge the matters set forth in the return to the writ of habeas corpus are true, excepting those matters which are stated on information and belief, and that as to those matters he believes it to be true.

P. A. ROBBINS.

Subscribed and sworn to before me this 14th day of February, 1919.

[Seal] C. W. CALBREATH,

Deputy Clerk, U. S. District Court, Northern District of California.

[Endorsed]: Filed Feb. 15, 1919. W. B. Maling, Clerk. By Lyle S. Morris, Deputy. [23]

At a stated term of the District Court of the United States, for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, State of California, on Saturday, the fifteenth day of February, in the year of our Lord one thousand, nine hundred and nineteen. PRESENT: The Honorable MAURICE T. DOOLING, Judge.

No. 16,500.

In the Matter of NG FUNG HO et al., on Habeas Corpus.

(Hearing on Return to Writ of Habeas Corpus.)

This matter came on regularly this day for hearing. Geo. A. McGowan, Esq., was present on behalf of petitioner and detained. B. F. Geis, Esq.,

Assistant United States District Attorney, was present on behalf of the United States. After hearing the respective attorneys, the Court ordered that said matter be submitted on brief to be filed by respondent in ten (10) days. Return to writ of habeas corpus was presented and filed by respondent. [24]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 16,500.

In the Matter of NG FUNG HO, Known as UNG KIP, NG YUEN SHEW, LUI YEE LAU, Known as LOUIE PON, GIN SANG GET and GIN SANG MO, on Habeas Corpus.

(Opinion and Order Quashing Writ of Habeas Corpus and Remanding Prisoners to Custody.

GEO. A. McGOWAN, Esq., Attorney for Petitioners.

ANNETTE ABBOTT ADAMS, United States Attorney, and BENJ. F. GEIS, Esq., Assistant United States Attorney, Attorneys for Respondent.

MEMORANDUM.

RUDKIN, District Judge.

Section 19 of the Immigration Act of February 5, 1917, contains numerous provisions for the deportation of aliens from the United States. In some in-

stances a time limit of three years from the date of entry is imposed, in others a time limit of five years, while in still others there is no time limit at all. The third proviso to the section reads as follows:

> "Provided further, That the provisions of this section, with the exceptions hereinbefore noted, shall be applicable to the classes of aliens therein mentioned irrespective of *the of* their entry into the United States."

The repealing clause found in section 38 of the act contains the following proviso: [25]

> "Provided further, That nothing contained in this act shall be construed to affect any prosecution, suit, action, or proceedings brought, or any act, thing or matter, civil or criminal, done or existing at the time of the taking effect of this act, except as mentioned in the third proviso of section nineteen hereof; but as to all such prosecutions, suits, actions, proceedings, acts, things or matters the laws or parts of laws repealed or amended by this act are hereby continued in force and effect."

The petitioner has been ordered deported by the immigration authorities and the sole question before the Court is may a Chinese subject who entered the United States prior to the taking effect of the Immigration Act of February 5, 1917, be deported under its provisions. It will readily be conceded that the act is awkwardly worded to say the least. Exception is grafted on to exception and proviso on to proviso until the meaning, in some instances at least, is well nigh incomprehensible, as is too often the

case with bureaucratic legislation. The office of a proviso is usually to limit or qualify the enacting clause, but this rule has little application to Congressional legislation, because it is a well known fact that new and independent legislation is often enacted under the guise of a proviso to a pending bill. Such is the third proviso to section 19 of the act in question. It enlarges or at least explains what has gone before. On the other hand, the second proviso to section 38 is a proper application of the term. If the proviso to section 38 excepted generally from the provisions of the act, all presecutions, suits, actions, proceedings, acts, things or matters done or existing at the time of its taking effect, it would doubtless receive the same construction as has been given a [26] similar provision found in section 299 of the Judicial Code, and the act would then be inapplicable to aliens in the United States at the time of its taking effect. But there is excepted from this general saving clause the cases mentioned in the third proviso to section 19 and that proviso is expressly made applicable to all classes of aliens irrespective of the time of their entry into this country. True there is excepted from the third proviso "the exception hereinbefore noted" which doubtless has reference to the time limit imposed on the deportation of certain classes of aliens, but inasmuch as no Court would permit the deportation of an alien after the time fixed by law for such deportation had expired, simply because the act was made reactive, the exception is meaningless. In other words the words last quoted are superfluous

and add nothing to or take nothing from the statute as a whole. If the statute is given the construction contended for by the petitioner it would seem that the third proviso to section 19 is entirely nullified. The sole purpose of that proviso was to make the statute retroactive or applicable to aliens in the United States at the date of its passage and if the repealing clause defeats that purpose there is a plain and manifest repugnancy between the two provisions. Such a conclusion will be avoided, if possible, and I am clearly of opinion that Congress intended that aliens of every class unlawfully in the United States should be subject to deportation under th act regardless of the time of their entry.

I regret the necessity which compels me to disagree with the Circuit Court of Appeals of the Fifth Circuit in Mayo vs. United States, 251 Fed. 275, where the [27] same question was involved, but if consolation be needed I find it in the silent dissent of one of the members of that court.

The writ of habeas corpus is quashed and the prisoners remanded to the custody of the immigration authorities.

[Endorsed]: Filed Jun. 2, 1919. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [28]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 16,500.

In the Matter of NG FUNG HO, Known as UNG KIP, NG YUEN SHEW, LUI YEE LAU, Known as LOUIE PON, GIN SANG GET and GIN SANG MO, on Habeas Corpus.

Notice of Appeal.

To the Clerk of the Above-entitled Court, and to ANNETTE ABBOTT ADAMS, United States Attorney for the Northern District of California.

YOU and each of you will please take notice that Ng Fung Ho, known as Ung Kip, Ng Yuen Shew, Lui Yee Lau, known as Louie Pon, Gin Sang Get and Gin Sang Mo, the petitioners herein, do hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the order and judgment made and entered herein on the 2d day of June, 1919, quashing the writ of habeas corpus heretofore issued herein, and remanding the petitioners to the custody of the Immigration authorities.

Dated, San Francisco, California, June 23d, 1919.

GEO. A. McGOWAN,

Attorney for Petitioners and Appellants Herein.

[29]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 16,500.

In the Matter of NG FUNG HO, Known as UNG KIP, NG YUEN SHEW, LUI YEE LAU, Known as LOUIE PON, GIN SANG GET and GIN SANG MO, on Habeas Corpus.

Petition for Appeal.

Come now Ng Fung Ho, known as Ung Kip, Ng Yuen Shew, Lui Yee Lau, known as Louie Pon, Gin Sang Get and Gin Sang Mo, the detained and petitioners, who are the appellants herein and say:

That on the 2d day of June, 1919, the above-entitled court made and entered its order and judgment herein, quashing the writ of habeas corpus heretofore issued herein, and remanding the petitioners to the custody of the immigration authorities, in which said order and judgment certain errors are made to the prejudice of the appellants herein, all of which will more fully appear from the assignment of errors filed herein.

WHEREFORE these appellants pray that an appeal may be granted in their behalf to the United States Circuit Court of Appeals for the Ninth Circuit for a correction of the errors so complained of, and further that a transcript of the record, proceedings and papers in the above-entitled cause, as shown by the praecipe, duly authenticated, may be sent and

transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit.

It is further prayed that during the pendency of the said [30] appeal that the said Ng Fung Ho, known as Ung Kip, Ng Yuen Shew, Lui Yee Lau, known as Louie Pon, Gin Sang Get and Gin Sang Mo may retain their liberty and remain at large under the order heretofore made herein, provided that they remain within the United States and render themselves in execution of whatever judgment is finally entered herein.

Dated, San Francisco, California, June 23d, 1919.

GEO. A. McGOWAN,

Attorney for Petitioners, Detained and Appellants Herein. [31]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 16,500.

In the Matter of NG FUNG HO, Known as UNG KIP, NG YUEN SHEW, LUI YEE LAU, Known as LOUIE PON, GIN SANG GET and GIN SANG MO, on Habeas Corpus.

Assignment of Errors.

Come now Ng Fung Ho, known as Ung Kip, Ng Yuen Shew, Lui Yee Lau, known as Louie Pon, Gin Sang Get and Gin Sang Mo, the petitioners and appellants herein, by their attorney Geo A. McGowan,

Esquire, in connection with their petition for appeal herein, assign the following errors which they aver occurred upon the trial or hearing of the above-entitled cause, and upon which they will rely upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to wit:

FIRST: That the Court erred in quashing the writ of habeas corpus issued herein and remanding the petitioners to the custody of the immigration authorities.

SECOND: That the Court erred in not holding that the allegations contained in the petition herein for a writ of habeas corpus, and the facts presented upon the issue made and joined herein were sufficient in law to justify the discharge of the petitioners from custody as prayed for in said petition.

THIRD: That the judgment made and entered herein is contrary to law. [32]

FOURTH: That the judgment made and entered herein is not supported by the evidence.

FIFTH: That the judgment made and entered herein is contrary to the evidence.

SIXTH: That the Court erred in holding that the Secretary of Labor had jurisdiction to deport for a violation of the Chinese exclusion law by the executive process provided for in section 19 of the Immigration Act of February 5th, 1917, Chinese persons who entered the United States prior to May 1, 1917, the date of the taking effect of the said Immigration Act.

SEVENTH: That the Court erred in holding that a Chinese person domiciled in the United States of

America charged solely with a violation of the Chinese exclusion law could be deported therefor in an executive deportation proceeding as provided for in the general immigration law.

EIGHTH: That the Court erred in holding that there was sufficient or any evidence submitted before the Secretary of Labor to show that there was a likelihood of the petitioner and appellant Lui Yee Lau known as Louie Pon, becoming a public charge at the time of his entry into the United States within the meaning and as the said term is used in the general immigration law.

NINTH: That the Court erred in holding that there was sufficient or any evidence submitted before the Secretary of Labor to show that the petitioners and appellants Gin Sang Get and Gin Sang Mo entered the United States without inspection.

TENTH: That the Court erred in holding that there was sufficient evidence or any evidence submitted before the Secretary of Labor to show that the petitioners and appellants Gin Sang Get and Gin Sang Mo entered the United States without inspection by means of false and misleading statements.

WHEREFORE, the appellants pray that the judgment and order of the United States District Court for the Northern Division of [33] California, Southern Division, First Division, made and entered herein in the office of the Clerk of said Court on the second day of June, 1919, quashing the writ of habeas corpus heretofore issued herein, and remanding the petitioners into the custody of the immigration authorities be reversed, and that this cause

be remanded to said lower court with instructions to discharge the said Ng Fung Ho, known as Ung ip, Ng Yuen Shew, Lui Yee Lau, known as Louie Pon, Gin Sang Get and Gin Sang Mo from custody all as prayed for in the petition for a writ of habeas corpus herein.

Dated, San Francisco, California, June 23d, 1919.

GEO. A. McGOWAN,
Attorney for Appellants.

[Endorsed]: Service of the within Notice of Appeal, Petition for Allowance of an Appeal, and Assignment of Errors, and receipt of a copy of each thereof is hereby admitted this 23 day of June, A. D. 1919.

ANNETTE ABBOTT ADAMS,
United States Attorney.

Filed Jun. 24, 1919. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [34]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 16,500.

In the Matter of NG FUNG HO, Known as UNG KIP, NG YUEN SHEW, LUI YEE LAU, Known as LOUIE PON, GIN SANG GET and GIN SANG MO, on Habeas Corpus.

Order Allowing Appeal.

On this 23d day of June, 1919, come Ng Fung Ho, known as Ung Kip, Ng Yuen Shew, Lui Yee Lau, known as Louie Pon, Gin Sang Get and Gin Sang Mo, petitioners and appellants herein, by their attorney, George A. McGowan, Esquire, and present to this Court their notice of appeal, petition praying for the allowance of an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, together with the assignment of errors to be relied upon on said appeal, from the order and judgment made and entered herein on the second day of June, 1919, quashing the writ of habeas corpus heretofore issued herein, and remanding the petitioners to the custody of the immigration authorities, which said appeal is intended to be urged and prosecuted by them, and praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit to the end that their prayer that the said judgment may be reversed might be heard and determined, and that such other and further proceedings may be had in the premises as may seem proper. [35]

In consideration whereof, this Honorable Court does hereby allow the appeal herein prayed for, and orders and directs that the execution of the warrants of deportation made by the Secretary of Labor against each of the said petitioners and detained be stayed pending a hearing and final determination of

the said cases in the United States Circuit Court of Appeals for the Ninth Circuit.

And it is further ordered, that the said Ng Fung Ho, known as Ung Kip, Ng Yuen Shew, Lui Yee Lau, known as Louie Pon, Gin Sang Get, and Gin Sang Mo may retain their liberty and remain at large during the continuance of the appeal proceedings herein under the order heretofore made herein upon the bonds heretofore given herein, provided that said petitioners and appellants remain within the United States and render themselves in execution of whatever judgment is finally entered herein.

Dated, San Francisco, California, June 23d, 1919.

E. S. FARRINGTON,
United States District Judge.

[Endorsed]: Filed Jun. 24, 1919. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [36]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 16,500.

In the Matter of NG FUNG HO, Known as UNG KIP, NG YUEN SHEW, LUI YEE LAU, Known as LOUIE PON, GIM SANG GET and GIM SANG MO, on Habeas Corpus.

Stipulation and Order Respecting Withdrawal of Immigration Record.

IT IS HEREBY STIPULATED AND AGREED

by and between the attorney for the petitioners and appellants herein, and the attorney for the respondent and appellee herein, that the original immigration records in evidence and considered as part and parcel of the petition for a writ of habeas corpus upon hearing of the demurrer and upon the return to the writ in the above-entitled matter may be withdrawn from the files of the clerk of the above-entitled court and filed with the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, there to be considered as part and parcel of the record on appeal in the above-entitled case with the same force and effect as if embodied in the transcript of the record and so certified to by the clerk of this Court.

Dated, San Francisco, California, June 23d, 1919.

GEO. A. McGOWAN,
Attorney for Petitioners Appellants.

ANNETTE ABBOTT ADAMS,
United States Attorney for the Northern District of California, Attorney for Respondent and Appellee. [37]

ORDER.

Upon reading and filing the foregoing stipulation, it is hereby ordered that the said immigration records therein referred to may be withdrawn from the office of the clerk of this court, and filed in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, said withdrawal to be made at the time the record on appeal herein is cer-

tified to by the clerk of this court.

E. S. FARRINGTON,
United States District Judge.

Dated, San Francisco, California, June 23d, 1919.

[Endorsed]: Filed Jun. 23, 1919. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [38]

Certificate of Clerk U. S. District Court to Transcript on Appeal.

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 38 pages, numbered from 1 to 38, inclusive, contain a full, true, and correct transcript of certain records and proceedings, in the matter of Ng Fung Ho. etc., et al., on Habeas Corpus, No. 16,500, as the same now remain on file and of record in this office; said transcript having been prepared in accordance with the praecipe for transcript on appeal (copy of which is embodied herein), and the instructions of the attorney for petitioners and appellants herein.

I further certify that the cost for preparing and certifying the foregoing transcript on appeal is the sum of fourteen dollars and thirty-five cents ($14.35), and that the same has been paid to me by the attorney for the appellants herein.

Annexed hereto is the original Citation on Appeal, issued herein (page 40.)

IN WITNESS WHEREOF, I have hereunto set

my hand and affixed the seal of said District Court, this 3d day of March, A. D. 1920.

[Seal] WALTER B. MALING,
Clerk.
By C. M. Taylor,
Deputy Clerk. [39]

(Citation on Appeal.)

UNITED STATES OF AMERICA,—ss.

The President of the United States, to Hon. Edward White, as Commissioner of Immigration for the Port of San Francisco, and to Annette Abbott Adams, U. S Attorney, His Legal Representative Herein, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the Southern Division of the United States District Court for the Northern District of California, wherein Ng Fung Ho, otherwise known as Ung Kip, Ng Yuen Shew, Lui Yee Lau, otherwise referred to as Louie Pon, Gin Sang Get and Gin Sang Mo, are appellants, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellants, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable FRANK H. RUDKIN, United States District Judge for the Southern Division of the United States District Court for the Northern District of California, this 29th day of November, A. D. 1919.

FRANK H. RUDKIN,
United States District Judge, [40]

[Endorsed]: No. 16,500. Southern Division of the United States District Court for the Northern District of California. In re Ng Fung Ho, et al., on Habeas Corpus, Appellants, vs. Edward White, as Commissioner, etc., Appellee. Citation on Appeal. Filed Nov. 29, 1919. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk,

Copy of the within citation on appeal lodged with me this 29th day of November, 1919.

W. B. MALING,
Clerk Southern Division of the U. S. District Court,
Northern District of California.
By C. M. Taylor,
Deputy Clerk.

Service of the within citation and receipt of a copy thereof is hereby admitted this 29th day of November, 1919.

ANNETTE ABBOTT ADAMS,
U. S. Attorney.

[Endorsed]: No 3462. United States Circuit Court of Appeals for the Ninth Circuit. Ng Fung Ho, Otherwise Known as Ung Kip, Ng Yuen Shew; Lui Yee Lau, Otherwise Referred to as Louie Pon;

Gim Sang Get and Gim Sang Mo, Appellants, vs. Edward White, as Commissioner of Immigration for the Port of San Francisco, Appellee. Transcript of Record. Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

Filed March 3, 1920.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 16,500.

In the Matter of NG FUNG HO, Known as UNG KIP, NG YUEN SHEW, LUI YEE LAU, Known as LOUIE PON, GIN SANG GET and GIN SANG MO, on Habeas Corpus.

Order Extending Time to Docket Case.

Good cause appearing therefor, and upon motion of Geo. A. McGowan, Esq., attorney for the petitioners and appellants herein,—

IT IS HEREBY ORDERED that the time within which the above-entitled case may be docketed in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Circuit may be and

the same hereby is extended for a period of thirty (30) days from and after the date hereof.

Dated, San Francisco, California, February 25th, 1920.

WM. B. GILBERT,
United States Circuit Judge.

Service of the within order extending time to docket case, and receipt of a copy thereof, is hereby admitted this 25th day of February, 1920.

ANNETTE ABBOTT ADAMS,
United States Attorney, for the Northern District of California.

[Endorsed]: No. 16,500. In the Southern Division of the United States District Court, for the Northern District of California, First Division. In the Matter of Ng Fung Ho, Known as Ung Kip, Ng Yuen Shew, Lui Yee Lau, Known as Louie Pon, Gin Sang Get and Gin Sang Mo. On Habeas Corpus. Order Extending Time to Docket Case.

No. 3462. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16, Enlarging Time to March 26, 1920, to File Record Thereof and to Docket Case. Filed Feb. 25, 1920. F. D. Monckton, Clerk. Refiled March 3, 1920. F. D. Monckton, Clerk.

No. 3462

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

In re NG FUNG HO, otherwise known as UNG KIP; NG YUEN SHEW; LUI YEE LAU, otherwise referred to as LOUIE PON; GIN SANG GET and GIN SANG MO,

(On Habeas Corpus),

Appellants,

vs.

EDWARD WHITE, as Commissioner of Immigration at the Port of San Francisco,

Appellee.

BRIEF FOR APPELLANTS.

GEO. A. McGOWAN,
Bank of Italy Building, San Francisco,
Attorney for Appellants.

PERNAU-WALSH PRINTING CO.

No. 3462

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

In re NG FUNG HO, otherwise known as UNG KIP; NG YUEN SHEW; LUI YEE LAU, otherwise referred to as LOUIE PON; GIN SANG GET and GIN SANG MO,

(On Habeas Corpus),

Appellants,

vs.

EDWARD WHITE, as Commissioner of Immigration at the Port of San Francisco,

Appellee.

BRIEF FOR APPELLANTS.

Statement of the Case.

These five appellants are persons of the Chinese race who have been ordered deported out of the United States to China by the *executive* deportation procedure of the General Immigration Law for a claimed violation of the Chinese Exclusion Laws which provide only for a *judicial* deportation hearing. There was much diversity in the holdings of the different District and Circuit Courts of Appeals upon this point, but the matter was finally determ-

ined by the Supreme Court in the case U. S. v. Woo Jan, 245 U. S. 552; 38 Sup. Ct. Rep. 207; that such deportations could only be brought about after a *judicial* hearing. The appellee seeks to distinguish these cases from the Woo Jan case in this particular, that the General Immigration Act here in question, is the Act of Feb. 5th, 1917, which so amended the earlier General Immigration Law, as to thereafter permit of the use of the *executive* deportation procedure for violations of the Chinese Exclusion Laws. That the law is so amended is true. Appellants point out however that this last enacted General Immigration Law only became effective on May 1st, 1917, and that they had all arrived in the United States prior thereto, all as shown by the warrants of deportation against them, and more particularly as follows:

Ng Fung Ho, at San Francisco, by ss. Manchuria, July 20, '15;

Ng Yuen Shew, at San Francisco by ss. Manchuria, July 20, '15;

Lui Yee Lau, at Seattle by ss. Yokohama Maru, April 15, '15;

Gin Sang Get, at San Francisco, by ss. China, July 24, 1916; and

Gin Sang Mo, at San Francisco, by ss. Shinyo Maru, April 28, '17,

and they have therefore called attention to and claimed the protection of Section 38 of the last

mentioned act, which, they claim, holds in force the prior existing laws, that is to say, the laws as they were in force immediately prior to the 1st day of May, 1917, which places them squarely within the ruling of the Supreme Court in the Woo Jan case. This briefly stated is the dominant point in these cases, and as it was equally applicable to each of the five, they joined in a common petition in their own names, to be relieved of the illegal restraint.

An examination of the warrants of deportation discloses that Ng Fung Ho and Ng Yuen Shew were not otherwise ordered deported. Not so, however, as to Lui Yee Lau and the brothers Gin Sang Get and Gin Sang Mo. They are also ordered deported for what is claimed to be a specific violation of the General Immigration Law. The first, that he was a person likely to become a public charge at the time of his entry, and the latter two that they had entered without inspection. These are suitable grounds for deportation under the General Immigration Law, provided there is any evidence to support the charges. The appellants claim that they are make-weight charges, entirely unsupported by any evidence, and have only been made by the Secretary by misconstruing the statute. The facts are as follows:

Lui Yee Lau entered the United States as a Chinese merchant having a certificate issued to him under the terms and provisions of Sec. 6 of Act of

May 6th, 1882, as amended by the Act of July 5th, 1884. His entry was effected through the Port of Seattle on April 15th, 1915, by order of the appropriate immigration authority. There was no evidence that he had secured his certificate fraudulently. There was no evidence that he had ever labored in the United States. There was no evidence that he had ever become a public charge in the years following his admission. The basis for the likelihood of becoming a public charge feature of the case, is the fact that almost two years after his admission at the Port of Seattle, he was found in Texas, where he was supposed to have been gambling, and was twice arrested. Upon the first charge he was tried and acquitted. Upon the second occasion he was arrested Jan. 26, 1918, and charged with vagrancy. To this charge he pleaded guilty and was fined $25.00 and costs, making a total of $39.60 which he paid. It is assumed that he suffered some short detention, as a result of these two arrests, prior to his being released upon bail, and because of these matters it is assumed that he was possessed of latent criminal tendencies at the time he arrived here and it is charged that he was likely to become a public charge at the time of his entry almost two years previously.

Gin Sang Get and Gin Sang Mo are additionally charged with having entered without inspection by means of false and misleading statements. However this may be, the *statutory* charge is that the

alien entered without inspection. To this the Secretary has added the qualification, *by means of false and misleading statements.* It is admitted that these two young men were applicants for admission at a regularly designated port of entry, they arrived by steamer, they were taken to the Immigration Station, they were held pending the taking of much testimony and the conducting of a very long and painstaking examination into the claims of their right of admission, and as a result thereof, they were regularly admitted into the United States upon order of the Commissioner of Immigration for this Port. They have consistently contended and maintained that the order so made was proper and that they were entitled as of right to admittance to and residence within the United States as citizens thereof, they being the foreign born sons of a native born citizen of the United States.

The petition for the writ sets forth the above facts and has attached thereto copies of the different warrants of deportation. A demurrer was interposed and the immigration records in each of the cases were admitted in evidence by mutual consent. Judge Dooling, then presiding in the lower court, overruled the demurrer and thereupon a return was filed, which set up no new matter. The case was finally submitted to Judge Rudkin, then presiding in the lower court, and his judgment was adverse to the petitioners and they accordingly perfected this appeal. The petitioners were admitted to bail by

the lower court when the petition was first presented and have since so been at liberty.

Argument.

The ten assignments of error made in this matter may be somewhat reduced by consolidating different of the points. The predominant point is common to the rights of each of the five petitioners and will be treated *first;* that is whether a person may be deported as an alien Chinese here in violation of the Chinese Exclusion Laws, by resorting only to the *executive* process contained in the last General Immigration Law, when such person had entered this country prior to the taking effect thereof; if this point is decided as contended for by appellants, there would then remain only the so-called makeweight alleged violations of the General Immigration Act itself made against three of the petitioners, therefore the *second* point is whether the statutory charge of likelihood of becoming a public charge at time of entry, which is made against Lui Yee Lau, is sufficiently supported by evidence and whether the phrase is subject to the latitudinarian construction sought for by the Secretary; while the *third* point is whether the statutory charge of entry without inspection made against Gin Sang Get and Gin Sang Mo is sufficiently supported by evidence and whether that ground of deportation may be supplemented by the charge "by means of false and mis-

leading statements" and if so, whether it is sufficiently supported by evidence. Should these points be decided adversely to petitioners there would then remain the question as to whether the respective hearings accorded by the Immigration authorities were fairly conducted and their conclusions sufficiently sustained by the evidence taken therein. This final point as it affects Lui Yee Lau, may for brevity's sake be treated in the *second* point, and for the same reason, as affecting Gin Sang Get and Gin Sang Mo, may be treated in the *third* point, thus leaving as the concluding point, the *fourth;* as affecting Ng Fung Ho and his son, Ng Yuen Shew, whether the hearing accorded them was fair and whether the conclusion reached was sufficiently sustained by the evidence presented.

First.

The appellee claims that these five petitioners are alien Chinese persons here in violation of the Chinese Exclusion Laws, all as more particularly set forth in the various *executive* warrants of deportation. It is shown from an inspection of the *executive* warrants of deportation, that in each instance the person proceeded against had arrived at the United States prior to May 1st, 1917, which was the date the General Immigration Law of Feb. 5th, 1917, became effective, and was not proceeded against until some considerable time thereafter. Ap-

pellants contend that there was no violation of the Chinese Exclusion Laws, but that if there was, such violation must have occurred at the time of the arrival of each appellant at the United States, and such violation was therefore an "act, thing or matter" "done or existing at the time of the taking effect" of the General Immigration Law, and could only be dealt with under the prior existing laws, which were specifically "continued in force and effect" in their original form for such purpose, which necessitated a *judicial* instead of an *executive* deportation proceeding.

The Act of Feb. 5th, 1917, concludes with Sec. 38, which is in part as follows:

> "Sec. 38. That this act, except as otherwise provided in section three, shall take effect and be enforced on and after May first, nineteen hundred and seventeen. * * *
>
> *Provided*, That this act shall not be construed to repeal, alter, or amend existing laws relating to the immigration or exclusion of Chinese persons or persons of Chinese descent, except as provided in section nineteen hereof, * * *.
>
> *Provided further*, That nothing contained in this act shall be construed to affect any prosecution, suit, action, or proceeding brought, or any act, thing, or matter, civil or criminal, done or existing at the time of the taking effect of this act, except as mentioned in the third proviso of section nineteen hereof; but as to all such prosecutions, suits, actions, proceedings, acts, things, or matters, the laws or parts of laws repealed or amended by this act are hereby continued in force and effect."

As for the Chinese Exclusion Acts, it is only necessary to generally call attention to the fact that *exclusive jurisdiction to deport* Chinese persons or persons of Chinese descent is conferred upon the *judicial branch* of the government. Act of May 6, 1882, as amended by the Act of July 5, 1884, Section 12 (22 Stat. L., 58; 23 Stat. L., 115); Act of Sept. 13, 1888, Section 13 (25 Stat. L., 476, 477); Act of May 5, 1892, Section 2, Section 3, Section 6 (27 Stat. L., 25); Act of Nov. 3, 1893, Section 6 (28 Stat. L., 7); Act of Mar. 3, 1901, Sections 1, 2, 3 (31 Stat. L., 1093); Act of April 29, 1902 (32 Stat. L., part 1, 176); Act of April 27, 1904 (33 Stat. L., 394-428). The exclusive character of this judicial deportation procedure has been upheld by the Supreme Court in the Woo Jan case mentioned in the statement of this case and need not be further referred to. This present Act as affecting the Chinese Exclusion Laws, amends its predecessor by the addition of the phrase *except as provided in section nineteen hereof.* Section 19 of the Act of Feb. 5th, 1917, designates the different classes of aliens whose presence shall be deemed objectionable and provides for the *executive* deportation procedure by the Secretary of Labor. The purpose of this amendment of the Chinese Exclusion Laws was unquestionably to at least invest concurrent if not exclusive jurisdiction upon the Secretary of Labor to exercise his *executive* deportation prerogative. The question here presented is whether this newly created power of the Secretary can have any *retroactive*

effect to cover prior alleged violations of the Chinese Exclusion Laws, in view of the sweeping saving clause which concludes the Act, and which ends as follows: *"but as to all such prosecutions, suits, actions, proceedings, acts, things, or matters, the laws or parts of laws repealed or amended by this act are hereby continued in force and effect".*

It will be noted that this saving clause is most sweeping, embracing matters both criminal and civil, and also whether in action or not, but the possible subject of future action, at the time of the taking effect of the Act, to-wit, May 1st, 1917. To this saving clause there is one exception placed in the middle: *"except as mentioned in the third proviso of section nineteen hereof".* This third proviso is as follows:

> *"Provided further,* That the provisions of this section, with the exceptions hereinbefore noted, shall be applicable to the classes of aliens therein mentioned irrespective of the time of their entry into the United States:"

It is at once observed that this sole exception to the saving clause contained in Section 38, has *plural* exceptions to its own scope of action. What are these exceptions? They must be first ascertained so that they may be withdrawn, for only in that way may be known the extent of the limitation on the saving clause contained in Section 38. An analysis of Section 19 discloses that it enumerates the various classes of aliens whose faults or misfortunes, as the case may be, renders their future residence

in this country objectionable, and according to the gravity thereof sets the time within which they may be deported, and it finally places them in three groups; the first of which we will call the *mild* offenders, may be deported within *three years after entry,* the second of which we will call the medium offenders, may be deported within *five years after entry,* while as to those remaining and who constitute the third group which we will call the extreme offenders, they may be deported *at any time after entry.* We therefore contend that the *"exceptions hereinbefore noted"* must of necessity be the three and the five-year groups, the mild and medium offenders which form the exceptions referred to in the third proviso of Section 19. This solution is not only reasonable and consistent, but is entirely in keeping with the grading of the offenders according to the gravity of their offending. Accordingly we observe from Section 19 that those who enter in "violation of any other law of the United States" which includes the Chinese Exclusion Laws, may be deported "at any time within five years after entry", and are therefore without the third proviso of Section 19, and hence are not affected by the withdrawing proviso contained in the saving clause in Section 38. In other words, as to the mild and medium offenders against the General Immigration Law, or the other laws of the United States brought thereunder, the prior existing laws were held in force as to such "prosecutions, suits, actions, proceedings, acts, things, or matters". As to the third

group, that is to say, the extreme offenders, they are withdrawn from the protection of the saving clause in Section 38, and may be deported "irrespective of the time of their entry into the United States". Adopting this view of the matter, these appellants having been charged by the Secretary of Labor with having entered the United States in violation of the Chinese Exclusion Law, such offense if committed at all, was complete and was "an act, thing or matter" "done or existing at the time of the taking effect" of the last General Immigration Law, May 1st, 1917, and they could accordingly only be prosecuted therefor under the prior existing laws which were continued in force for such purpose. Woo Jan v. U. S., supra, which necessitates a judicial proceeding.

The exact point here raised was before the Circuit Court of Appeals for the Fifth Circuit in the case of Mayo, Immigration Com'r, v. United States, 251 Fed. 275. It is disclosed by the transcript of the record in that particular case, that there, as here, there were five Chinese persons arrested upon the Secretary's executive warrants. The trial court discharged them from custody. The government appealed all of the cases and stipulated that the four remaining cases might follow the decision to be rendered in the first case which is the one mentioned above. The court there held as follows:

> "It is difficult to determine just what is meant by the third proviso of section 19; the exception to the last proviso of section 38 is

> not more clear. To give to the latter the meaning suggested by the government would be to permit the exception to substantially (if not absolutely) destroy the proviso. It way be possible to ascribe a meaning to each clause which would give effect to both. If the third proviso of section 19 be held to make that section applicable to all aliens, without reference to the time of their entry, who do, after the passage of the act, something denounced by the act, and if the last proviso of section 38 be held to preserve the status existing at the time of the passage of the act as to all aliens who commit no new offense thereafter, consistency and effect would be given to all the language under consideration. Under this view the 'things and matters' 'as they existed' with relation to the relator 'at the time of the taking effect of the act'—that is, his status as an alien in the country in violation of the Chinese Exclusion Law—will be dealt with by the law as it was before the passage of the act.'

There is but one point in the case at bar in which it differs from the case just cited. The right of the alien (Lee Wong Hin) in the Mayo case to reside in the United States was *in action* at the time of the taking effect of the General Immigration Law, whereas with respect to these appellants, if they had violated the Chinese Exclusion Law in their entry or re-entry into the United States, such violation was then and there an "act, thing or matter, civil or criminal, done or existing at the time of the taking effect" of the last General Immigration Law, though *not then in action.* This difference however does not affect the legal status of the case, this for the reason that the saving clause in

Section 38 is unusual, by reason of including acts, things and matters not in suit or action; but we submit, the very fact that such acts, things and matters are specifically named shows an unmistakable intent upon the part of Congress to save the prior acts as to them, as well as to the acts, things and matters on suit or action.

It is felt that there would have been more certainty in the expression of the opinion of the court in Mayo v. U. S., supra, had the industry of counsel directed the attention of the court to prior legislation and the judicial construction thereof. Thus the prior Immigration Act, that of Feb. 20th, 1907, contains in Section 28 almost exactly the same saving clause. This Act is construed in Botis v. Davis, 173 Fed. 996, and it is there held on page 999 as follows (after setting forth Section 28):

> "The act of 1907, therefore, is wholly prospective in its operation. The language used in the quoted section could hardly be made more comprehensive or explicit. All acts, things, and matters done or existing when the statute took effect are governed by earlier laws. The date of taking effect was July 1st, 1907, several months after Botis landed. So there can be no question that the act of 1907 has no bearing or effect on Botis' status, which is governed entirely by pre-existing laws. * * *"

In viewing this same Act, that of 1907, the Circuit Court of Appeals for the Seventh Circuit in the case of Davies v. Manolis, 179 Fed. 818, clearly support this view, holding that the alien having entered the country in August, 1906, long prior to

the enactment of the Act of Feb. 20th, 1907, he could not be deported thereunder. If he had violated a prior Immigration Act he must be specifically charged thereunder and given a hearing under the then existing law.

Pressing the research further, we find that the next earlier Immigration Act was that of March 3, 1903 (32 Stat. L., 1220), wherein Section 28, though differently worded, covered the same legislative intent as expressed in Section 28 of the Act of Feb. 20th, 1907, and Section 38 of the Act of Feb. 5th, 1917. This legislation was construed by the Circuit Court of Appeals for the Seventh Circuit in the case of Lang v. U. S., 133 Fed. 201. The court there held:

> "* * * No prosecution could be based on the amendatory statute for acts done prior to its enactment; what Congress meant in the section preserving the right to prosecute under the statute was, that no prosecution begun under that statute, whether they were then pending, or should thereafter be brought, should lapse by reason of this effort to enlarge and tighten the hold of the government upon this class of importations. It is to carry out this purpose that the word "begun" is employed, merely as a connective to identify a prosecution pending or to be brought, with the statute under which it is brought."

See also the concurring opinion of Jenkins, Circuit Judge.

It is further submitted that the legislative intent here manifested is reflected from earlier enactments, notably Rev. St., Section 13 (U. S. Comp. St. 1901,

p. 6), enacted in 1871, and commented upon in Judge Jenkins concurring opinion. It finds a more recent expression in Section 299 of the Judicial Code.

In the case of Russomanno, 128 Fed. 528, the Circuit Court, Lacombe, Circuit Judge, held:

> "The authority to deport this alien is to be found in the act of 1891 (Act March 3, 1891, c. 551, sec. 11, 26 Stat. 1086 (U. S. Comp. St. 1901, p. 1299)), not in the act of 1903. In as much as he was not seized, even, for purposes of deportation, until more than a year had elapsed after his last entry into the United States, the time within which he could be taken into custody under the act of 1891 had fully expired.
>
> The prisoner is discharged."

In the opinion filed in this case by Judge Rudkin, wherein he sets forth the reasons which impelled him to dissent from the opinion of the Circuit Court of Appeals for the Fifth Circuit in Mayo v. U. S., supra, he in part adopts our reasoning wherein he holds:

> "But there is excepted from this general saving clause the cases mentioned in the third proviso to section 19 and that proviso is expressly made applicable to all classes of aliens irrespective of the time of their entry into this country. True there is excepted from the third proviso 'the exceptions hereinbefore noted' which doubtless has reference to the time limit imposed on the deportation of certain classes of aliens,—"

but we feel that from this point on the court erred, the opinion proceeds:

> "* * * but inasmuch as no court would permit the deportation of an alien after the time fixed by law for such deportation had expired, simply because the act was made reactive, the exception is meaningless. In other words, the words last quoted are superfluous and add nothing to or take nothing from the statute as a whole."

Here we have the court, by a bold direct stroke, eliminating entirely from the act, exceptions which Congress in its wisdom saw fit to place therein. The trial Court holds "the exception is meaningless", but we submit that the fact that Congress placed the exception there, conclusively implies that it is not meaningless but that it has a real and substantial purpose for being in the Act. We feel that the trial court erred. We feel that the Supreme Court announced a very safe rule when, in the case of Wiborg v. U. S., 163 U. S. 623, it was held, speaking through Chief Justice Fuller, respecting statutory construction,

> "that its every word should be presumed to have some force and effect".

Upon the subject of this Act the lower court holds as follows:

> "It will readily be conceded that the act is awkwardly worded, to say the least. Exception is grafted on to exception and proviso on to proviso until the meaning, in some instances at least, is well nigh incomprehensible, as is too often the case with bureaucratic legislation."

An inspection of Section 19 discloses that it has six such provisos or exceptions "grafted" on it.

The purpose of these provisos and exceptions was to reflect in the Act itself various of the court holdings and interpretations of the prior existing Act and to make some changes to conform to subsequent holdings of the courts. Of this there is no question, as a reading of these various concluding portions of the section at once calls to mind the cases from which they were taken or which caused them to be so added to the Act. Of all of these different matters, the *third proviso* reflects by far the most important of the litigation which followed the enactment of the earlier Act of Feb. 20th, 1907, and also the Act of Mar. 3rd, 1903, for that matter. That is the question as to whether this legislation applied to *alien immigrants alone* or whether it applied to *domiciled aliens as well.* This point was variously decided by many of the district courts and by the appellate courts. This court in the case of Moffitt v. U. S., 128 Fed. 375, and in the subsequent case of U. S. v. Nakashima, 160 Fed. 842, held as respects each of the two acts mentioned, that they only applied to *aliens who were immigrants,* and not to those who were *domiciled aliens.* This point was finally settled by the Supreme Court in its decision in the case of Lapina v. Williams, 232 U. S. 78; 34 Sup. Ct. Rep. 196, by the holding that the acts applied to aliens, whether returning to a previously acquired domicile or as immigrants. This decision was rendered Jan. 5th, 1914, and comments at length upon the earlier conflict of judicial opinions and the importance of the point. When we consider that this present Act is mainly a recodification

of the prior existing immigration legislation, it is all the more apparent that Congress would want to make it very plain, that while the wording of the Act may have been changed, there was to be no change as to whether the legislation applied to domiciled aliens or not and whether domicile could be asserted to defeat deportation. For this reason, we submit, this third proviso was inserted. How complete it is for the purpose is most obvious. Note the language—the provisions of this section, with the exceptions hereinbefore noted, shall be applicable to the classes of aliens therein mentioned irrespective of the time of their entry into the United States. Congress here gave protection the right of domicile when over three years, for the mild offenses; when over five years for the medium offenses, and no such protection, no matter how long the domicile, for the more serious offenses. When we take this view of the matter it is at once apparent why this proviso was inserted in the saving clause contained in Section 38. Congress did not intend that the more serious offenders, that is the moral degenerates, the outcasts, the enemies of civilized peoples and organized governments, should ever be heard to assert the right of domicile to defeat an effort to deport them out of the country. We assert that this, in our opinion, is exactly what Congress intended to and what it in fact did do.

This creates no hiatus in the enforcement of the law. On the contrary, it holds in force the law which has been violated for the express purpose

of the prosecution, either criminal or civil, of all transgressions against it. Thus a person who has offended against the prior Immigration Act, may be arrested and charged with such violation and made to answer thereto. A person who has offended against the Chinese Exclusion Laws prior to the amendment thereof as contained in the last Immigration Law, may be arrested and charged with such violation as provided in the Chinese Exclusion Laws, which necessitates a *judicial* hearing all as held by the Supreme Court in the Woo Jan case. To deport under the present Immigration Law for a violation of a prior Immigration Law, matters little to such a defendant, the procedure of deportation being the same under both the old and the new Immigration Laws, always provided of course that it is made clear to the defendant what law he is charged with having violated. This does not hold good however when the violation complained of is of the Chinese Exclusion Laws prior to May 1st, 1917, for as to such violation, the judiciary, under those laws as then existing, has exclusive jurisdiction.

Another point to be made in connection with these cases is that three of them, the first three, all arose with the Fifth Circuit, where the decision of the appellate court of the Circuit in Mayo v. U. S., supra, is supposed to be the prevailing law. The government accepted that decision. They did not ask either a rehearing or for *certiorari*. In spite of this we find the Immigration Department,

even in cases which arose within that circuit, in effect ignoring the decision in a like case in which they were a party. The case was decided in the lower court July 24, 1917, which was prior to the issuance of any of the warrants of arrest in these cases. In attempting to overrule or ignore that decision, they should be held to abide their election and their jurisdiction failing, an order of absolute discharge should be made herein. That was even then the order on July 24, 1917. The decision of the Circuit Court of Appeals in Mayo vs U.S. supra, was rendered on April 12,1918, and even that was prior to the issuance of the warrant of deportation against the appellant Lui Yee Lau. Having invoked that appellate jurisdiction, and having accepted that decision without either asking a rehearing or certiorari, it is felt that in the practice within that district and circuit at least they should be guided by it.

SECOND.

The second point affects Lui Yee Lau, otherwise referred to as Louie Pon. It is whether the statutory charge under the General Immigration Law that "He was a person likely to become a public charge at the time of his entry into the United States" and the statutory charge under the Chinese Exclusion Law, he having entered with a merchant's certificate (commonly referred to as a Section 6

Certificate) "but having become a laborer since admission" are sufficiently supported by evidence and whether they fall within the respective statutes, and herein generally whether the statutes are subject to the latitudinarian construction sought for by the Secretary.

The facts upon which these two charges are based are the same in each instance. This Chinese alien entered through a regular port of entry, Seattle, Washington, on April 15th, 1916, by order of the appropriate immigration authorities, after having produced his Section 6 Merchant's Certificate and being subjected to the usual examination with respect thereto. He has never been a public charge nor has he ever labored since his admission to the United States, as those terms are generally understood. The government however takes the position that almost two years after his admission, at Seattle, he was found in Texas, where he was supposed to have been gambling, and he was twice arrested. Upon the first charge he was tried and acquitted. Upon the second, the arrest occurring on Jan. 26th, 1918, he was charged with vagrancy, pleaded guilty and was fined $25 and costs, making a total of $39.60 which he paid. *It is assumed though not proven* that he suffered some short detention as a result of these two arrests prior to his being released upon bail. Because of these matters it is charged that he was possessed of latent criminal tendencies at the time he arrived here and it therefore assumed that he was likely to become a public charge at the time

of his entry by reason thereof, which is violative of the General Immigration Law, and further that as a gambler is a laborer, he has labored since his admission into the United States, which is violative of the Chinese Exclusion Act. This is the theory of the government as affects this appellant.

Both of these exact identical points were recently before Judge Dooling, in the case of Lui Sin Fan, ...Fed....., wherein the court held as follows:

> "The detained is a Chinese who has been ordered deported. He was admitted as a Section 6 Canton merchant on January 14, 1916. It is not charged that he entered fraudulently, but that he became a laborer after his admission.
>
> But in Lui Hip Chin v. Plummer, 238 Fed. 763, the Circuit Court of Appeals for this Circuit have held that this is not a ground for deportation. It is also charged that at the time of his admission he was a person likely to become a public charge. This is predicated on the fact that in January, 1917, he was arrested on a charge of statutory rape, to which he pleaded guilty, and was sentenced to three months in the county jail and to pay a fine of $100.00.
>
> It is the opinion of the bureau that his commission of this offense shows that at the time of his entry he was a person likely to become a public charge because of his criminal tendencies. The question thus presented has not, so far as I have been informed, been authoritatively decided. But the same act which provides that one likely to become a public charge may be excluded, also provides that one may be deported, who has been sentenced to imprisonment for a term of one year or more because

of conviction in this country of a crime involving moral turpitude.

It seems to me that the detained is really ordered deported because he was convicted of an offense which carried with it only a sentence of imprisonment for three months, although such deportation is put upon another ground. I have never been fully satisfied that the words 'likely to become a public charge' mean 'likely thereafter to commit some offense which will occasion imprisonment'. This seems as good a case as any by which to find out what the words really mean. As I do not agree with the bureau's construction, I think the burden should be upon the Government of taking the case to the Court of Appeals."

In passing it may be stated that the government accepted the decision above set forth and did not appeal therefrom. Attention is also directed to the recent case of Howe v. U. S., 247 Fed. 292, by the Circuit Court of Appeals for the Second Circuit, wherein this same "likely to become a public charge" element was involved. The court there held as follows:

"Indeed, with such latitudinarian construction of the provision 'likely to become a public charge', most of the other specific grounds of exclusion could have been dispensed with. Idiots, imbeciles, feeble-minded persons, insane persons, persons affected with tuberculosis and prostitutes, might all be regarded as likely to become a public charge. The excluded classes with which this provision is associated are significant. It appears between 'paupers' and 'professional beggars'. We are convinced that Congress meant the act to exclude persons who were likely to become occupants of almshouses

> for want of the means with which to support themselves in the future. If the words covered jails, hospitals, and insane asylums, several of the other categories of exclusion would seem to be unnecessary. * * *"

Further cases illustrative of this same judicial leaning are Ex parte Hill, 245 Fed. 687, and Ex parte Mitchell, 256 Fed. 229. All of these cases in reality follow the decision of the Supreme Court in Gegiow v. Uhl, 239 U. S. 31, wherein the phrase "likely to become a public charge" was judicially construed and commented upon.

As to whether the evidence in the record would sustain an order of deportation under the terms of the Chinese Exclusion Act we say most emphatically no. It is not charged that he obtained his Section 6 Certificate by fraud or any indirection or that any of its recitals are untrue. On the contrary, it is merely and exclusively charged therein with "having become a laborer since admission" (see warrant of deportation against Lui Yee Lau). This exact point was before this court in the case of Lui Hip Chin v. Plummer, 238 Fed. 763, and it was there held that it was not a ground of deportation. This case has abundant legal support set forth therein to substantiate the conclusion reached. The cases need not be repeated herein. This case is controlled by that decision, for the point is exactly the same. The court there said:

> "The fact that one who has been admitted into the United States as a merchant subse-

quently becomes a laborer is not in itself ground for his deportation.

"There was no charge that the appellant entered the United States with the intention of becoming a laborer, or that he procured his certificate as a merchant by means of fraud or misrepresentation. If such fraud or misrepresentation was intended to be relied upon as the ground of his deportation, he was entitled to be advised of it.

"But suspicion is not sufficient to justify deportation on the ground that admission was fraudulently obtained."

That in the immigration record of Lui Yee Lau it is practically admitted that there is no merit in the charge that he violated the Chinese exclusion laws. The extract is taken from page 15.

> "It is doubtful that the charge that he secured admission by fraud by representing himself to be a merchant can be substantiated, as the alien claims that he was a bona fide merchant in China prior to his departure for this country, and there is no evidence controverting such claims."

In finally submitting this point as to the appellant Lui Yee Lau, we state that whether his case be viewed through the procedure of the General Immigration Law as to the claimed violations of that law and also of the Chines Exclusion Law, or as to the latter claimed violation of the Chinese Exclusion Law, trialable alone as we claim before the judicial branch of the government, we must come to the same conclusion, namely, that there is no evidence in the record upon which, as a matter of

law, deportation can be based, by whatsoever procedure followed. Hence we submit that upon the merits of the case as disclosed from the immigration record in Lui Yee Lau's case, he is entitled to an absolute discharge.

THIRD.

The third point affects Gin Sang Get and Gin Sang Mo, brothers, who are the foreign-born sons of a native-born citizen of the United States, and hence are themselves citizens of the United States. It is whether the statutory charge under the General Immigration Law that "He entered without inspection, by means of false and misleading statements" and the charge under the Chinese Exclusion Law with "being a Chinese laborer not in possession of a certificate of residence", which is separately made as to each of the brothers, are sufficiently supported by evidence and whether the charges as claimed fall within the respective statutes.

By referring to the warrants of deportation as to these brothers, we find that it is charged that the first, Gin Sang Get entered on the 24th of July, 1916, and the second, Gin Sang Mo, entered on April 28th, 1917. In each instance it is disclosed that the appellants arrived at a regularly designated port of entry for Chinese and immigration purposes upon regular passenger steamers, that they were duly taken to the immigration station and

after a protracted examination of witnesses and examination of prior immigration records, and making of reports by the government's investigative officers, these boys were ordered admitted into the United States as citizens thereof by the Commissioner of Immigration for the Port of San Francisco, thereafter applying for and receiving their certificates of identity. Here was no entry without inspection. On the contrary, here was an entry after a most rigid and protracted examination made upon the order of the Commissioner of Immigration. But the Secretary states "by means of false and misleading statements", thus by a latitudinarian construction of the statute adding something to it which changes absolutely its meaning. Has the Secretary of Labor power to take the statutory ground of deportation "who enters without inspection" and add the qualifying and contradictory phrase "by means of false and misleading statements" and so completely change the charge as to made it a flat contradiction of the congressional will? The extraordinary power which Congress (Section 19, last Immigration Act) gave the Secretary was to reach the cases of

> "any alien who shall have entered the United States by water at any time or place other than as designated by immigration officials, or by land at any place other than one designated as a port of entry for aliens by the Commissioner General of Immigration, or at any time not designated by immigration officials, or who enters without inspection".

These appellants have not violated these statutory provisions but on the contrary have complied with them. They entered at a duly designated port of entry, at a time and place where they were received, inspected and examined by the immigration officials, they were taken to the Angel Island Immigration Station and held and examined, their cases were reported upon, considered at length, and thereafter they were duly landed by order of the immigration officials. The records in each of their cases show this. The extraordinary power which Congress gave the Secretary was to reach the cases of those who evaded inspection, examination and compliance with the order disposing of their cases. When this charge is established it means deportation, irrespective of the fact that the person might have been admissable into the United States, had he submitted his claims to the immigration officials and been content to abide their decision. Congress did not extend it to those who had complied with all of the forms and procedure exacted by the statute. Certainly this is an attempted amendment to the law, not an interpretation of it. To enter without inspection has a clear cut, well defined meaning which leaves no room for doubt in the mind of a person as to the issue he has to meet, which is what Congress intended it should be, simple and direct, with no chance of a misunderstanding. To enter without inspection, *by means of false and misleading statements,* is in itself a violent contradiction. Not only this, but it is manifestly vague and am-

biguous, affording the person charged no adequate information of what he has to meet. It is without the authority of the statute and therefore lacks binding force and effect. It is not "within the authority of the statute" which is one of the essential prerequisites as held in Low Wah Suey v. Backus, 225 U. S. 460, by the Supreme Court, and further commented upon in Gegiow v. Uhl, 239 U. S. 31, supra. In the case of Howe v. U. S., 247 Fed. 292, supra, the same charge of entry without inspection, to which must have been added the qualification here complained of, was involved, and there as here it was shown that the person had entered after inspection and a submission of his claims of admission to the immigration authorities, upon whose order he was admitted. The appellate court there said as to this charge:

> "There seems to us to be no ground whatever for saying that he entered in violation of law."

This entry without inspection charge was formerly considered by Judge Dooling in the case of Wong Tuey Hing, 213 Fed. 112, to which the attention of the court is most respectfully invited. The court said:

> "If he entered without inspection, as the warrant of deportation recites, it was because the immigration officials did not desire to inspect him, not because he prevented them from so doing",

and after calling attention to Rule 3 of the Chinese Regulations:

> "It is eivdent therefore that, if the immigration officers failed to inquire into petitioner's status as an alien as distinguished from his status as a Chinese alien, they did so in violation of this rule, and cannot now hold petitioner responsible therefor. He complied with every requirement of the law to establish his status as a Chinese entitled to depart from and return to this country. If that status is to be inquired into again a year after his re-entry into the country, it should be inquired into under the exclusion laws and not under the immigration act."

In the case of General Castro (203 Fed. 155), reported as U. S. v. Williams, it is held:

> "Aliens have the right to enter the United States except so far as the right is restricted by our statutes. * * * The burden is upon the immigration authorities to show that any alien denied the right to enter does fall within one of these exceptions to the general privilege. Although an alien who has not yet entered may not enjoy the constitutional guaranties of citizens, he has rights under this law which must be respected."

In Redfern v. Halpert, 186 Fed. 150, the appellate court for the Fifth Circuit held with approval:

> "The immigration statutes are very drastic, deal arbitrarily with human liberty, and I consider they should be strictly construed."

We submit that there is nothing to support the contention that these young men entered the United States in violation of that part of the Immigration Law which prohibits entry without inspection.

The contention of the government that they could so interpret the statute by regulation must fall to the ground. It is against all of the cases upon that point. Morril v. Jones, 106 U. S. 466, it is held:

> "In our opinion, the object of the secretary could only be accomplished by an amendment to the law. That is not the office of a treasury regulation."

See also U. S. v. George, 228 U. S. 14, where the court, through Mr. Justice McKenna, said:

> "If the Secretary of the Interior may add by regulation one condition, may he not add another? If he may require a witness or witnesses in addition to what section 2291 requires, why not other conditions, and the disposition of the public lands thus be taken from the legislative branch of the government and given to the discretion of the Land Department?"

In the case of U. S. v. United Verde Copper Co., 196 U. S. 207, the court, speaking again through Mr. Justice McKenna, said:

> "If rule 7 (the regulation involved) is valid, the Secretary of the Interior has power to abridge or enlarge the statute at will. If he can define one term he can another. If he can abridge, he can enlarge. Such power is not regulation; it is legislation."

We submit that vast powers are given the immigration officials in the legislation under consideration. Those powers are so almost unlimited in their scope that we are struck with wonder that any attempt should be made to enlarge upon them by indulging in such dubious construction. Certainly

there must be a limit somewhere and the court is most respectfully called upon to define it. We feel that this alleged violation of the Immigration Law is nothing but a makeweight charge thrown in against these appellants in a vain endeavor to bring these cases within their executive jurisdiction, the department knowing before it had issued its warrants of deportation that the Circuit Court of Appeals for the Fifth Circuit had already held that the Secretary was without jurisdiction where the Chinese Exclusion Law alone was involved.

Turning our attention now to the case of these two boys upon the merits, we find that whether examined under the one law or the other that their claim of American citizenship should have been recognized. The additional safeguards of a judicial hearing with all the sanctity of its procedure and the impartiality of its hearing and ultimate judgment (as set forth in Woo Jans case), would have given these appellants a more fair and adequate opportunity to present their defense. Even so and considering the limitations which the executive character of the hearing placed them under, we feel that their case of American citizenship was fully and fairly made out when they were applicants for admission into the United States, all as shown by the records in the admission cases of each thereof. After being duly admitted into the United States they had issued to them their respective certificates of identity, and this attempt of the immigration officials to now retry that issue and determine it

adversely upon suspicion and conjecture should not be encouraged. There is a growing tendency in the decisions of the courts to hold these immigration decisions in favor of admission, and the certificates of identity issued under departmental regulation for the future protection of such former applicants for admission, as entitled to the recognition of the courts as establishing a prima facie right of residence, in the absence of a satisfactory showing of error. See the case of Liu Hop Fong v. U. S., 209 U. S. 453, where the court said "certainly the certificate ought to be entitled to some weight". In the case of U. S. v. Hom Lim, 214 Fed. 456, at 463 the court said:

> "The decision of his right to enter was presumptively correct, and, unless the United States shows persuasively to the contrary, the mere certificate of admission is sufficient."

In Ex parte Wong Yee Toon, 227 Fed. 247, at 251 the court said:

> "Such a certificate imports at least prima facie verity. It cannot be treated as if it had never existed. Some evidence must be produced to justify the immigrant officials denying to it its usual and appropriate effect."

And in the same case upon appeal to the Circuit Court of Appeals, Wong Yee Toon v. Stump, 233 Fed 194, at 196 the court said:

> "After the certificate is issued, it is our view that the burden is cast upon the government, in case a proceeding is instituted to attack it, to show by testimony which the law recognizes

as evidence that it should be annulled before an order for deportation is warranted."

In the case of Lui Hip Chin v. Plummer, 238 Fed. 763, supra, this court held:

"But suspicion is not sufficient to justify deportation on the ground that admission was fraudulently obtained."

Attention is also directed to the recent case of Lum You, 262 Fed. 451, wherein Judge Dooling held as follows:

"The record shows that petitioner was admitted to this country in January, 1910, as the son of a native born citizen of this country. He was about 12 years old. In 1916 he returned to China without a preinvestigation of his status, because of the serious illness of his mother in China whom he desired to see, did not afford him time for such preinvestigation. Returning in March, 1919, he was denied admission because of certain discrepancies between his testimony and that of his alleged father and because of other discrepancies in the testimony of the father given at different times in regard to the conditions in the home village. None of these latter seem to bear at all upon the question of relationship, which is the only question in dispute.

The rights of one whose status as an American citizen has already been determined, who has lived a number of years in this country without question, should be, it seems to me, more stable than to be overturned by the evidence in the present case much of it having nothing at all to do with the question at issue. I do not mean that a first, or second, or third adjudication of status by the Department is final, or that it may not later be set aside, but

> I do mean that there should be some substantial reason for so doing. To my mind such does not appear in the present case."

Attention is also directed to the case of Chan Wy Sheung, 262 Fed. 221, wherein it is held:

> "I am fully aware of the limited power of the court in matters of this kind and of the force and effect that must be given to the findings of the department, but I am of the opinion that the question here presented is one of law rather than of fact and I cannot sanction the injustice that would result from excluding the applicant from the country at this late day under the circumstances disclosed by this record. The decisions of the department after a full hearing should be given some effect and should not be overturned or set aside in subsequent cases upon any such pretext or for any such reasons as are here assigned."

This point is submitted upon the immigration record in the admission case and as supplemented by the record in the deportation proceeding. We feel that the burden of the government, under the Immigration Law and the decisions here quoted, of showing some real substantial evidence to support them in attempting, at this late date and in this disadvantageous kind and class of a hearing, to set aside the former finding of American citizenship of these two appellants by the appellee herein, has been a failure, no such evidence being disclosed. These two appellants were originally admitted into this country as citizens thereof by order of the appellee herein after a most protracted examination of many witnesses, inspection of records, reports

of inspectors and so on. Their landing was proper. They were given certificates of identity as evidence of their lawful residence as citizens within this country. They have consistently maintained the lawfulness of their residence here and are within the protection of our constitutional guaranties, mentioned in General Castro's case (203 Fed. 155), and it is most respectfully submitted that they are entitled to be relieved of the restraint imposed by the warrant of the Secretary. See the recent case of U. S. v. Low Hong, 261 Fed. 73, by the Circuit Court of Appeals for the Fifth Circuit wherein the determination of American citizenship was not held to be dependent upon the investigation and determination thereof by the Secretary.

FOURTH.

This, the final point in the case, affects the first two of the appellants, Ng Fung Ho and his son, Ng Yuen Shew whether the hearing accorded them was fair and whether the conclusion reached was sufficiently sustained by the evidence contained in the record.

Ng Fung Ho was readmitted into the United States as a Chinese merchant returning to his previously acquired domicile. He presented the evidence required by the statute in such cases exacted and was readmitted. The evidence of the then minority and the existence of the relationship of father and son between Ng Fung Ho and Ng

Yuen Shew was then and there established and is still conceded (we believe we are correct in this) to be correct. The status of the son Ng Yuen Shew is held to be entirely dependent upon the status of the father, Ng Fung Ho, his right of continued residence standing or falling with his.

Upon this point these appellants are alien Chinese, entitled under the Chinese Exclusion Law to a judicial hearing to test the legality of their continued right of residence. They entered this country almost two years before the present General Immigration Act became effective. The son was landed by order of the Secretary of Labor, and in reaching that order the lawfulness of the domicile of the father was recognized. For the period of almost two years after their admission, had their right of residence been assailed, it could only have been done by a judicial proceeding. That was a valuable right attached to their right of residence in this country (Woo Jan's case, supra). To attempt to now deport them without such judicial hearing is to deprive them of a fair opportunity to safeguard their right of residence in this country. They presented the evidence exactly by the statute, by the kind of witnesses exacted therein, and it was so determined by the officials whose duty it was to pass upon the facts, and they were and are therefore entitled to residence in this country. Chin Fong v. White, 258 Fed. 849. They were issued certificates of identity and, under the line of authorities set forth in the two preceding points, these were not to

be ignored. They were presumptively correctly admitted. We feel that full justice to these two appellants may only be accorded them by a judicial hearing.

These cases are finally submitted as to each of the four points involved. Attention is again called to the statement thereof. If the first point is sustained in favor of appellants, there would still remain the second and third points as solely affecting the alleged specific violations of the General Immigration Law. Should the first point be decided adversely to the appellants, there would yet remain the second, third and fourth points, the sustaining of any of which would mean the release of the appellant or appellants whose rights are therein affected, irrespective of the adverse finding upon the jurisdictional feature involved in the first point. We feel that any final judgment in favor of any or all of the appellants should be that of an absolute discharge.

Dated, San Francisco,
May 5, 1920.

Respectfully submitted,

GEO. A. MCGOWAN,
Attorney for Appellants.

No. 3462

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

In re NG FUNG HO, otherwise known as UNG KIP; NG YUEN SHEW; LUI YEE LAU, otherwise referred to as LOUIE PON; GIN SANG GET and GIN SANG MO,

(On Habeas Corpus),
Appellants,

vs.

EDWARD WHITE, as Commissioner of Immigration at the Port of San Francisco.

Appellee.

BRIEF FOR APPELLEE.

ANNETTE ABBOTT ADAMS,
United States Attorney,

BEN F. GEIS,
Asst. United States Attorney.
Attorneys for Appellee.

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BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

The appellants herein are persons of the Chinese race who have been arrested and ordered deported on warrants of the Secretary of Labor under the provisions of Section 19 of the Immigration Act of February 5, 1917.

Ng Fung Ho, alias Ung Kip, arrived at the Port of San Francisco, July 20, 1915, ex SS Manchuria,

and was admitted as a returning Chinese merchant July 22, 1915, and his alleged Ng Yuen Shew, who accompanied him, was admitted by the Secretary of Labor on appeal December 7, 1915. Both were arrested on warrants issued by the Assistant Secretary of Labor, dated December 20, 1917 (Ex. C pp. 27 and 28), given the hearings required by law and warrants of deportation issued December 21, 1917, (Ex. C pp. 78 and 79).

Lui Yee Lau arrived at the Port of Seattle on the SS. "Yokahama Maru" and was admitted April 15, 1916, as a Section-6 Chinese Merchant. He was arrested on a warrant of the Assistant Secretary of Labor, dated February 16, 1918 (Ex. B pp. 17), given the hearing required by law and ordered deported on the warrant of the Secretary of Labor, dated May 24, 1918 (Ex. B P 51).

Gin Sang Get and Gin Sang Mo, were admitted at the Port of San Francisco, the former August 12, 1916, and the latter May 7, 1917, as the sons of Gin Quon Yuen, a court discharged citizen of the United States. Both were arrested on warrants issued by the Assistant Secretary of Labor dated November 12, 1917 (Ex. A pp. 2 and 3), given the hearings required by law, and ordered deported on warrants issued by the assistant Secretary of Labor, dated February 4, 1918. (Ex. A pp. 18 and 19.)

These cases have twice been before the Lower Court in this District on petitions for writs of Habeas Corpus. They were first before his Honor Judge Dooling, in cases numbered 16342 in re Ng Fung Ho and Ng Yuen Shew; 16344 in re Gin San Get and Gin Sang Mo and 16396 in re Lui Yee Lau, who sustained demurrers to the petitions and denied the writs in June 1918. From said decisions appeals were taken to this court but before the cases were docuted, at the request for Counsel for Appelants, the appeals were, by consent, dismissed and a new petition numbered 16500 was filed in which all five join. This action was taken for the reason that the decision of the Circuit Court of Appeals for the Fifth Circuit, in the case of Lee Wong Hin, 251 Fed. 275, holding that section 19 of the Act of February 5, 1917, was not retrospective had just been reported and it was desired that this point be passed upon by the District Court in these cases.

Under the new petition 16500 the cases were again submitted to his Honor Judge Dooling, a demurrer to the petition was filed and overruled and thereupon a return was filed. The case was finally submitted to his Honor Judge Rudkin on return who denied the petition and dismissed the writ (T. R. p. 28).

It further apears from the Immigration records that in the cases of Ng Fung Ho alias Ung Kip and Ng Yuen Shew that petitions for writs were filed in

the District Court at San Antonio, Texas, and that said applications were denied after hearing on February 6, 1918 (Ex. C p. 82).

ARGUMENT.

This case presents three points for determination by this Court, viz:

FIRST. Does the record show that the hearings accorded the appellants herein, were unfair?

SECOND. Does the record show a manifest abuse of discretion on the part of the Immigration Officials in directing the deportation of Appellants?

THIRD. Has the Secretary of Labor, under Sections 19 and 38 of the Immigration Act of February 5, 1917, and within the limitations stated therein, authority to arrest and deport, on departmental warrant, alien Chinese persons found within the United States in violation of the Chinese Exclusion Law whose entry occurred prior to the date said Immigration Act went into effect (May 1, 1917).

For the sake of convenience we will follow the order adopted in appellants brief and present the third point first.

THIRD POINT.

Has the Secretary of Labor, under Sections 19 and 38 of the Immigration Act of February 5, 1917, and within the limitations stated therein, authority to arrest and deport on departmental warrant alien

Chinese persons found within the United States in violation of the Chinese Exclusion Acts whose entry occurred prior to the date said Act went into effect? (May 1, 1917.)

A comparison of the present Immigration Act of February 5, 1917, with that of the Act of February 20, 1907, which it repealed, and reference to the report of the Senate Committee on Immigration, Number 352, 64th Congress, first session, will be of assistance in determining just what authority Congress intended to, and did, confer, upon the Secretary of Labor under the present Act.

ACT OF FEBRUARY 20, 1907.

Sec. 20: "That any alien *who shall enter* the United States in violation of law, and such as become public charges from causes existing prior to landing, shall, upon the warrant of the Secretary of Labor, be taken into custody and deported to the country whence he came at any time within three years after the date of his entry into the United States."

Sec. 21: "That in case the Secretary of Labor shall be satisfied that an alien has been found in the United States in violation of this Act, or that an alien is subject to deportation under the provisions of this Act or of any law of the United States, he shall cause such alien within the period of three years after landing or entry therein to be taken into custody and returned to the country whence he

ACT OF FEBRUARY 5, 1917.

Sec. 19: "That at any time within five years after entry any alien WHO SHALL HAVE ENTERED, OR WHO SHALL BE FOUND in the United States in violation of this Act, or in violation of any other law of the United States, * * * shall, upon the warrant of the Secretary of Labor be taken into custody and deported." * * * Provided, further, That the provisions of this section, WITH THE EXCEPTIONS HEREINBEFORE NOTED, shall be applicable to the classes of aliens therein mentioned, irrespective of the time of their entry into the United States." * * * (3rd Proviso)

"Provided further, That any person who shall be arrested under the provisions of this Section on the ground that he has entered or

came, as provided by Section 20 of this Act.''

Sec. 43: ''That the Act of March 3, 1903, * * * and all Acts and parts of Acts inconsistent with this Act are hereby repealed; Provided, that this Act shall not be construed to repeal, alter or amend existing laws relating to the immigration or expulsion of Chinese persons or persons of Chinese decent. * * *

Sec. 28. ''That nothing contained in this Act shall be construed to affect any prosecution, suit, action, or proceedings brought, or any act, thing, or matter, civil or criminal, done or existing at the time of the taking effect of this Act; but as to all such prosecutions, suits, actions proceedings, acts, things, or matters, the laws or parts of laws repealed or amended by this Act are hereby continued in force and in effect.''

been found in the United States in violation of any other law thereof, which imposes on such person the burden of proving his right to enter or remain, and who shall fail to establish the existence of the right claimed, shall be deported to the place specified in such other Act. In every case where any person is ordered deported from the United States under the provisions of this Act, or of any law or treaty, the decision of the Secretary of Labor shall be final.'' (5th Proviso.)

Sec. 38: ''This Act, except as otherwise provided in Section 3, shall take effect and be in force on and after May 1, 1917. * * * Provided, That this Act shall not be construed to repeal, alter, or amend existing laws relating to the immigration or exclusion of Chinese persons, or persons of Chinese descent, EXCEPT AS PROVIDED IN SECTION 19 HEREOF. * * * PROVIDED FURTHER, That nothing contained in this Act shall be construed to affect any prosecution, suit, action or proceedings brought, or any act, thing, or matter, civil or criminal, done or existing at the time of the taking effect of this Act, EXCEPT AS MENTIONED IN THE THIRD PROVISO OF SECTION 19 HEREOF; but as to all such prosecutions, suits, actions, proceedings, acts, things or matters, the laws, or parts of laws, repealed or amended by this Act are hereby continued in force and effect.''

It will be observed that Section 38 of the present Act, corresponds to Sections 43 and 28 of the earlier Act, being the repealing sections of said Acts. Section 38, however, contains two exceptions, to wit: "EXCEPT AS PROVIDED IN SECTION 19 HEREOF," and "EXCEPT AS MENTIONED IN THE THIRD PROVISO OF SECTION 19 HEREOF," which do not appear in Sections 43 and 28 of the earlier Act. Surely these exceptions were intended to have some meaning and some bearing on the sections of the Act in which they appear and to which they refer, and we submit were not placed by Congress in these provisos for any idle purpose, as will be shown by reference to Senate Report hereafter quoted. From the very wording of these exceptions, and the fact that they do not appear in the earlier Act, it is clear that Congress intended they should so modify and restrict the provisos of which they are a part as to exclude from the other provisions of said provisos the classes of aliens enumerated in Section 19, to which said exceptions undoubtedly refer.

Section 19 enumerates the classes of aliens subject to arrest and deportation on warrant of the Secretary of Labor; all the classes so enumerated are included in the third proviso of said Section, to wit: "That the provisions of this Section, with the exceptions hereinbefore noted, shall be appli-

cable to the classes of aliens therein mentioned irrespective of the time of their entry into the United States," without again enumerating them; they are again included in the exception to the first proviso of Section 38, to wit: "Except as provided in Section 19 hereof," without renumeration, and again, in the exception to the second proviso of said Section 38, to wit: "Except as mentioned in the third proviso of Section 19 hereof." Surely these exceptions, although expressed in different language, can have reference to none other than the classes first enumerated in Section 19 and each comprehends within its meaning the classes so enumerated.

This Section, besides enumerating the various classes of aliens subject to arrest and deportation on the warrant of the Secretary of Labor, fixes the time limit, if any, within which, after entry, they may be so arrested and deported. In certain classes the time limit is fixed at three years, others at five years, and in others, there is no time limit set; they, the latter, may be deported at any time after entry.

The Senate Committee, in its report, says: "With *certain* exceptions, the provisions of Section 19 are made retroactive," but fails to state just what these "certain exceptions" are. The language, however, denotes that the words are used in a limited sense and not in a general sense. It refers to, and has

the same meaning as, the exception in the third proviso of Section 19, to wit: "With the exceptions hereinbefore noted."

We submit, therefore, that the exceptions referred to as "noted," in the third proviso of said Section, are *first:* "Any alien who shall have entered or who shall be found in the United States in violation of this Act"; *second:* "Any alien who is *hereafter* sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States"; *third:* "Any alien who is *hereafter* sentenced more than once to such a term of imprisonment because of conviction in this country of any crime involving moral turpitude, committed at any time after entry."

As to those who enter in violation of "this Act," the law is of course not retrospective. As to the last two classes just before mentioned, the Act is clearly retrospective with respect to time of entry, but not retrospective with respect to conviction.

It is to these last mentioned three classes to which the exception in the third proviso of Section 19, to wit: "WITH THE EXCEPTIONS HEREINBEFORE NOTED," applies. All the other classes mentioned in said section fall within the scope of the third proviso of said Section, as it would read,

if the exception was omitted, to wit: "That the provisions of this Section * * * shall be applicable to the classes of aliens therein mentioned irrespective of the time of their entry into the United States." This third proviso indicates an intention that all the provisions of said Section shall be retroactive, except such as contain within themselves an indication of a contrary intent. The expression "with the exceptions hereinbefore noted," could not mean anything else because the exceptions are not set down categorically but are "noted," merely in the broad sense of being self descriptive in that respect.

The wording of Section 19 is such in itself as to indicate very clearly that certain provisions thereof were intended to be construed as retrospective and certain other provisions not so intended. The change in language from "WHO SHALL ENTER" as used in the Act of February 20, 1907, to the language "WHO SHALL *HAVE ENTERED,*" in the Act of February 5, 1917, clearly indicates such an intent. It will be observed that the language, to wit: "WHO SHALL ENTER" is used in the future tense, and the language "WHO SHALL *HAVE ENTERED*" is used in the past perfect tense.

The following is quoted from Senate Committee Report Number 352, 64th Congress, First Session, heretofore referred to.

"SECTION 19—DESCRIPTION."

This is a combination of Sections 20 and 21 of the Act of 1907, with the addition of several classes to the list of aliens whose deportation is prescribed. Such of these additions as are important are mentioned hereinafter; in the main, they correspond to the additions made to the excluded classes in Section 3. To the fullest extent practicable this section has been made to include all the classes subject to deportation after having entered the country; this is accomplished in two ways, first, by enumerating the classes and indicating the period, where any is set, within which deportation must be effected, and, second, by incorporating in this section, in much plainer language, the provisions of Section 20 and 21 of the existing law, which require the deportation of aliens "who shall enter the United States in violation of law" and with respect to him, the Secretary of Labor, "shall be satisfied" that they have been found in the United States "in violation of this Act," or that they are subject to deportation under this Act or "any law of the United States." * * * Its object is to make perfectly clear the intent to continue the practice established when the Act of 1907 was passed of expelling from the United States every alien, who, after having secured admission in one way or another, was found here within the period of limitation fixed and was found to have been at the time of his entry a member of any one of the list of classes enumerated in Section 2 of the said Act, corresponding to Section 3 of this Act; *and also the*

*intent to continue the practice established under that Act, and since approved in a number of court decisions, * * * of expelling aliens who enter or are found here in violation of the Chinese Exclusion Law, adapting the administrative process of the Immigration Act to that class of cases wherever the proceedings are instituted within the period of limitation specified therein.*

The existing law authorizes the deportation of any alien who becomes a public charge, within the specified time limit, from causes existing prior to entry. As H. R. 6060 passed the Senate it changed the latter part of this provision so that it read "from causes not affirmatively shown to have arisen subsequent to landing." The change went out of the measure in conference. It has now been restored by the house committee and accepted by the house. Many cases arise in which it is practically impossible for the Government to carry the burden imposed upon it as the existing law is worded, and the Commissioner General of Immigration and the Secretary of Labor have repeatedly recommended that this change be made.* * *

When the Act was passed as H. R. 6060 it contained a new provision for the deportation of aliens who commit serious crimes within five years after entry, the courts pronouncing sentence being authorized to recommend in any instance that deportations shall not occur. As the Act now stands, the House has added, at the suggestion of its committee, a provision intended to reach the alien who, after entry, shows himself to be a criminal of the

confirmed type, such aliens to be deported without limitation on the length of time after entry when they commit a second serious offense; and there were added on the floor of the House two provisions, the obvious purpose of which, is to allow either a court or the judge thereof a reasonable time after pronouncing sentence upon a convicted alien within which to determine whether he will recommend to the Secretary of Labor that deportation be not effected after the sentence has been served.

With respect to each class, where a limitation of time is placed upon deportation, it has been changed to five years (with the exception of those who merely enter surreptitiously or without inspection), the limitation of existing law being three years. Prostitutes, procurers and other members of the classes inhibited on grounds of sexual immorality, have been subject to deportation without time limitation since the passage of the act of March 26, 1910 (36 Stat. 263); and the propriety of this has been emphatically and distinctly upheld by the Supreme Court (Lapina v. Williams, 232 U. S. 78). This policy is continued and certain other classes, equally undesirable have been included within its scope, to wit: the anarchistic classes; and those who were criminals before they came to this country.

At the suggestion of the Senate Committee there was incorporated in H. R. 6060 a proviso, the necessity for which had been pointed out by the Secretary of Labor and the Attorney General, the purpose of which was to break up the extensive practice under which that despicable class of persons

that deal in women for immoral purposes manage to retain their victims in the United States by having them marry American citizens. This proviso is retained in the present Act with slight improvements in its wording made on the floor of the House.

WITH *CERTAIN* EXCEPTIONS the provisions of the Section are made retroactive, and the section is made consistent with other sections in its application to aliens from the Insular possessions.

The proviso added by the House Committee of the present Congress is a repetition of an amendment to an amendment which was inserted in H. R. 6060 in conference but which, because of the legislative situation of the Act at that time, was awkwardly located in the Section. The language has been materially clarified, the purpose is to make it clear that Chinese arrested under the section on the ground that they *have entered* or been found in this country within the fixed time limit in violation of the Exclusion Laws shall be required, as they are under the Exclusion Laws, to make an affirmative showing in order to escape deportation, and that such persons shall be deported to China, as required by the Exclusion Laws, if the country from which they immediately come places restrictions upon their return thereto, having in mind particularly the fact that Canada will not permit the United States to deport a Chinese into Canadian territory unless upon payment to the Canadian Government of the $500 head tax.

The last proviso, while new in this particular location, is not new in the law, the courts having re-

peatedly held that in cases of aliens arrested for deportation, as well as in the cases of those excluded at our ports, the decision of the administrative officers is final, and the Supreme Court, having in several decisions regarded the case of the alien arrested for deportation as practically a deferred exclusion (the Japanese Immigrant case, 198 U. S. 86; Pearson v. Williams, 202 U. S. 281)."

We submit that an analysis of the law in light of the above report does not permit of any construction other than that contended for by the Government, if the expressed will and intent of Congress is to be given effect and that Congress clearly intended to so frame the present Immigration Act as to overcome the defects and cure the evils in the earlier Act.

It follows, therefore, that "any alien who *shall have entered* or who shall be found in the United States in violation of any other law of the United States," meaning the Chinese Exclusion Laws, "shall at any time within five years after entry," and "irrespective of the time of entry," whether before or since the passage of this Act, "on the warrant of the Secretary of Labor, be taken into custody and deported."

Counsel for petitioners cites the case of Mayo, Immigration Commissioner, Exrel v. U. S., ex rel Lee Wong Hin, 251 Fed. 275 C. C. A. 5th, as sustaining the first point raised by him in the present

case. That opinion, it will be observed, is not unanimous, one of the honorable judges dissenting. The cited case is to be distinguished from the one at bar in this—that the relator, Lee Wong Hin, had heretofore been ordered deported on warrant of the Secretary of Labor issued under the Act of February 20th, 1907, a petition for writ of habeas corpus was denied by the District Court, and on appeal, the judgment of the lower court was reversed "with directions to entertain the petition and to grant the writ, unless the United States, within such time as the District Judge deems reasonable, institutes proceedings against the relator under the provisions of the Chinese Exclusion Act." (240 Fed. 368.) The decision was rendered March 10, 1917 and the present Immigration Act passed February 5, 1917, effective May 1, 1917. Apparently no action was taken to deport relator under the provisions of the Chinese Exclusion Laws, due, no doubt, to the fact that the new Immigration Act, passed about thirty days before the decision was rendered, would become effective in less than two months and before the five year limit had expired.

With due deference to the opinion of the learned judges in the case relied upon by petitioners, it is the Government's contention that the decision is not a correct interpretation of the sections of the Act involved, nor in accord with the expressed in-

tent of Congress as shown by the Act, itself, and Senate Report heretofore quoted, nor when viewed in light of previous decisions on the same subject matter under the Act of February 20, 1907, and the defects and evils found to exist under said Act and sought to be remedied in the present Act.

There was a diversity of opinions in both the District and Circuit Courts on the question of the jurisdiction of the Secretary of Labor under the Act of February 20, 1907 (Sections 20 and 21), to arrest and deport Chinese aliens found in this country in violation of the Chinese Exclusion Acts and the following cases sustain the power of the Secretary of Labor:

Ex parte Woo Shing, 226 Fed. 141, D. C., Sep. 16, 1915.

Lo Pong vs. Dunn, 235 Fed. 510, C. C. A. 8, July 10, 1916.

Sivray vs. U. S., 227 Fed. 1, C. C. A. 3, Nov. 3, 1915.

The power of the Secretary was denied in the following cases:

Ex parte Woo Jan, 228 Fed. 927, D. C., Jan. 22, 1916.

U. S. vs. U. S. Ex rel Lem Hin, 239 Fed. 1023, C. C. A. 7, Jan. 19, 1917.

Lee Wong Hin v. Mayo 240 Fed. 368, C. C. A. 5, Mar. 10, 1917.

The question was finally settled by the Supreme Court, in U. S. vs. Woo Jan, 62 L. Ed. 466, decided January 28, 1918, holding that the Secretary of Labor did not have such jurisdiction because of the provisions of Section 43 of said Act. It will be noted this case was not decided until nearly a year after the present Act was passed (Feb. 5, 1917).

It is clear that Congress, at the time the present Act was under consideration, had in mind the fact that this diversity of opinion existed and sought by the changes made in the new Act, to cure the defects and evils existing in the earlier Act, and it is apparent from an analysis of the sections of the Act under discussion, that that purpose was intended to be, and we submit, has been accomplished.

That resort may be had to the discussion of the subject, to ascertain the intention of Congress in passing an Act, we cite the following:

> "The great fundamental rule in construing statutes is to ascertain and give effect to the intention of the legislature."
> 162 Fed. 331; 170 Fed. 529.
>
> "Resort may be had to the intention of Congress, the object to be secured, and to such extrinsic matters as the circumstances attending its passage and its relation to other laws. Every statute must be construed with reference to the object intended to be accomplished by it."
> 160 Fed. 700; 158 Fed. 931; 162 Fed. 145.

"In order to ascertain this object, it is proper to consider the occasion and necessity of its enactment, the defects or evils in the former law, and the remedy provided by the new one," and "If the purpose and well ascertained object of a statute are inconsistent with the precise words, the latter must yield to the controlling influence of the legislative will resulting from the whole Act."
143 Fed. 783.

"The words, phrases and sentences of a statute are to be understood as used, not in any abstract sense, but with due regard to the context, and in that sense which best harmonizes with all the other parts of the statute."
159 Fed. 33; 20 Fed. 524; 200 Fed. 239; 185 Mo. 25-62; 84 S. W. 76; 206 U. S. 226-229; 95 N. Y. 554-559.

It is evident from the briefs filed in the Lee Wong Hin case that the court did not have before it, when considering the matter, Senate Report heretofore quoted, nor does it appear therefrom, that the defects or evils in the old law, which the new Act sought to remedy were before the Court for its consideration. The Court said: "It is difficult to determine just what is meant by the Third Proviso of Section 19; the exception to the last proviso of Section 38 is not more clear. To give the latter the meaning suggested by the Government would be to permit the exception to substantially (if not absolutely) destroy the proviso."

It is the Government's contention in the case at bar that the third proviso of Section 19 comprehends within its meaning all the classes described in said Section and, with the exception of the three classes heretofore mentioned, to wit: "any alien who shall have entered in *violation of this Act,*" "any alien who is *hereafter* sentenced, etc.," and "any alien who is *hereafter* sentenced more than once, etc.," in much more affirmative language than that heretofore used declares, "that the provisions of this Section, with the exceptions hereinbefore noted, shall be applicable to the classes of aliens therein mentioned, irrespective of the time of their entry into the United States, hence, making the provisions of Section 19 "with certain exceptions" retrospective in their operation, and further contends that the exception to the last proviso of Section 38, to wit: "except as mentioned in the third proviso of Section 19 hereof," is intended to, and does include, all the classes included in the third proviso of said Section, viz., those mentioned in Section 19, and that said exception so modifies and restricts the proviso of which it is a part, as to exempt from the other provisions of said proviso the classes of aliens enumerated in said Section 19.

We submit that the above is the proper and only construction to be given these two exceptions and that to give the meaning contended for to the lat-

ter would not "be to permit the exception to substantially (if not absolutely) destroy the proviso," for the reason that there are many other sections of both the old and the new Act, violations of which are punishable, either by fine, or imprisonment, or both, and which are not affected by the exception, but to which the other provisions of said proviso apply, to wit: a violation of Section 4 is punishable by imprisonment by not more than ten years and by fine of not more than $5000; Section 5 by penalty of $1000 in a civil action or in criminal action for misdemeanor, a fine of not more than $1000, or imprisonment not less than six months nor more than two years; Sections 6 and 7, same as Section 5; Section 8, by fine of not over $2,000 and imprisonment not over five years; Section 10, by fine not less than $200 nor more than $1,000, or one year or both, or a penalty of $1,000 as a lien on ship; Section 16, not over one year, or not over $2,000 fine, or both; Sections 20 and 23, same penalty as Section 8; Section 28, by fine of not more than $5,000 or imprisonment not more than five years, or both, and $1,000 or six months' imprisonment, or both; Section 31, penalty of $5,000 in libel suit; Section 32, $1,000 in libel suit; Section 33, same penalty as 32.

It is only the "things and matters" described in Section 19 "as they existed at the time of the taking effect of the Act," that are excepted from the

other provisions of the second proviso of Section 38 by the exception thereto, but the "things and matters" described in the other sections of said Act, "As they existed at the time of the taking effect of the Act," are not affected by the exception but as to them, the latter, "the laws or parts of laws repealed or amended by this Act are hereby continued in force and effect."

SECOND POINT.

Does the record show a manifest abuse of discretion on the part of the Immigration Officials in directing the deportation of appellants?

Ng Fung Ho alias Ung Kip and Ng Yuen Shew were both arrested on warrants issued by the Assistant Secretary of Labor dated September 20, 1917, wherein it is charged that they have been found in the United States in violation of the Chinese Exclusion Law and setting forth wherein they are subject to deportation (Ex. C pp. 27 and 28).

Both were arraigned under said warrants October 16, 1917, and were permitted to inspect the warrant of arrest and all the evidence on which said warrants were issued, and the aliens notified of their right to be represented by counsel (Ex. C pp. 59 and 55). Said hearings were continued until October 30, 1917, at which time aliens were represented by counsel who was allowed to inspect the warrants

of arrest and all the testimony and evidence forming the immigration record. Counsel was further advised of his right to have witnesses subpoened if he so desired, which right was waived. (Ex. C. pp. 58 and 54). A brief was filed by counsel (Ex. C p. 67) and the record forwarded to the department together with the report of the inspector conducting the hearings under said warrants (Ex. C pp. 51-46), for the action of the Secretary of Labor.

After a careful review and consideration of the evidence the Assistant Secretary, whose memorandum forms a part of the Immigration record (Ex. C pp. 76-73), ordered the aliens deported and warrants of deportation were issued accordingly (Ex. C pp. 78 and 79).

The evidence in this case plainly shows that Ng Fung Ho, alias Ung Kip, at the time of his departure for China was not a merchant within the meaning of the Chinese Exclusion Law, not having been engaged in buying and selling merchandise at a fixed place of business for the space of one year immediately preceding the date of his departure from the United States. On the contrary, the record clearly shows that he was a laborer engaged in the restaurant business in Texas, and had been so for many years prior to his departure for China, and immediately upon his return he again engaged in the same occupation. His re-entry into the United

States was accomplished by fraud and being a laborer he could not re-enter as such, not having a laborer's return certificate required by law. His Son, Ng Yuen Shew, whose right to enter depended upon the mercantile status of his alleged father, was also inadmissible and was also admitted by reason of the fraud perpetrated on his behalf by his alleged father. It would seem that this case falls squarely within the decision of this Court in the case of Ng Leong v. White, 260 Fed., 749.

LUI YEE LAU was arrested on the warrant of the Secretary of Labor, dated February 16, 1918, charging him with being in the United States in violation of the Chinese Exclusion Law, and further charged that he was a person likely to become a public charge at the time of his entry into the United States (Ex. B, p. 17).

He was arraigned under said warrant February 18, 1918, and advised of his right to be represented by counsel. The hearing was postponed until March 4, 1918, at which time alien was represented by counsel, who was allowed to inspect the warrant of arrest and all the evidence on which same was issued and all the testimony taken up to that time. The hearing was concluded on that day, counsel being present during all of said hearing. (Ex. B, pp. 34-26.)

A brief was filed by counsel (Ex. B, p. 43) and

made a part of the record which, together with the report and findings of the examining inspector (Ex. B, p. 37), was forwarded to the Department for the action of the Secretary of Labor.

After a careful review of all the evidence contained in the Immigration record, as set out in the memorandum of the acting Secretary (Ex. B, pp. 48 and 49), the alien was ordered deported and a warrant of deportation issued accordingly (Ex. B, p. 51).

His Honor Judge Dooling, in passing on the case of Lui Yee Lau, June 29, 1918, when the same was before him as number 16,396, held as follows:

> "Petitioner entered this country in April, 1916, as a merchant with a Section 6 certificate. He has never engaged in any mercantile pursuit here and was arrested on a departmental warrant in San Antonio, Texas, being charged *inter alia* with being a laborer unlawfully in this country, in that he had no laborer's certificate.
>
> He was held by the department to be a laborer, that is to say, a gambler, and ordered deported. I have no doubt that a gambler is a laborer within the meaning of the Chinese Exclusion Act. I do not think the mercantile status of petitioner when he entered the country has been successfully challenged. But his entry as a merchant did not authorize his remaining as a gambler.
>
> There being sufficient evidence to sustain the

charge that he was a gambler for some months before his arrest, the demurrer will be sustained, and the petition for a writ denied."

Gin Sang Get and Gin Sang Mo were arrested on warrants issued by the Assistant Secretary of Labor, dated November 12, 1917, charging that they had been found in the United States in violation of the Chinese Exclusion Law, and further, that they entered without inspection by means of false and misleading statements. (Ex. A, pp. 2 and 3.)

Both were arraigned and partial hearings had on said warrants November 23, 1917, at which time they were represented by counsel (Ex. A, pp. 66 and 63). At the request of counsel the hearings were continued from time to time in an effort to locate the alleged father and obtain his testimony, but without success. The hearings were finally concluded January 16, 1918 (Ex. A, pp. 61-53), and the immigration records, together with the inspector's report and findings (Ex. A, pp. 111-109), were forwarded to the department at Washington, D. C., counsel for appellants filing no brief, but submitting the case on the record.

The Assistant Secretary of Labor, after a careful review and consideration of all the evidence as appears from his memorandum, ordered the aliens' deportation (Ex. A, pp. 116-114), and warrants of deportation were issued accordingly (Ex. A, pp. 118 and 119).

We believe and confidently urge that an inspection of the immigration records in these cases will convince the Court that appellants are unlawfully in the United States as charged, and that the evidence fully supports the findings and conclusions of the Immigration Officials and the orders of deportation made therein.

FIRST POINT.

Does the record show that the hearings accorded the appellants herein were unfair? We submit that the immigration records in these cases disclose no unfairness, but on the contrary that the aliens were accorded every opportunity of presenting any and all evidence in support of their right to be and remain in the United States; that they were represented by counsel, and that none of the rights to which they are entitled under the law or the rules and regulations promulgated by the Department of Labor for conducting such hearings was denied them.

We submit without further argument that the judgment of the lower Court in dismissing the writ of Habeas Corpus in this case should be affirmed.

Respectfully submitted,

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BEN F. GEIS,
Asst. United States Attorney.
Attorneys for Appellee.

No. 3462

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

In re NG FUNG HO, otherwise known as UNG KIP; NG YUEN SHEW; LUI YEE LAU, otherwise referred to as LOUIE PON; GIN SANG GET and GIN SANG MO,

(On Habeas Corpus),

Appellants,

vs.

EDWARD WHITE, as Commissioner of Immigration at the Port of San Francisco,

Appellee.

APPELLANTS' PETITION FOR A REHEARING.

GEO. A. McGOWAN,
Bank of Italy Building, San Francisco,
Attorney for Appellants and Petitioners.

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APPELLANTS' PETITION FOR A REHEARING.

To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Come now the appellants Ng Fung Ho, Ng Yuen Shew, Gin Sang Get and Gin Sang Mo and file this their petition for a rehearing of the issues raised herein. The appellant Lui Yee Lau, otherwise

referred to as Louie Pon, accepts the judgment rendered herein and does not join in this petition.

This court in its decision herein holds that the last General Immigration Act, that of February 5, 1917, is retroactive in this that it permits of the trial and deportation by *executive process* of Chinese found in this country in violation of the Chinese Exclusion Acts, irrespective of whether their entry had preceded the taking effect of the last General Immigration Act or not. This in its effect partially circumvents the decision of the Supreme Court in the *Woo Jan* case (245 U. S. 552) wherein it was held that Chinese persons could not be so deported, but if removed at all it should be by *judicial process.*

Since the submission of this case to this court the Supreme Court has had occasion to advert to the decision in the *Woo Jan* case in a way and manner which leads us towards the conclusion that that august tribunal does not regard that decision as having been so circumvented in the actual operation of the Chinese Exclusion Acts. The case referred to is that of *White v. Chin Fong,*.....U. S....., decided on May 17, 1920. There is another thought that tends to confirm this view. The *Woo Jan* case was decided by the Supreme Court almost one year after the Immigration Act of February 5, 1917, was adopted. It is quite probable that this last mentioned act, being then prevailing law, was a present and operative factor in the mind of the court when, in concluding its decision in that case, it held:

> "This difference must be kept in mind. The Chinese Exclusion Laws have not the character or purpose of the Immigration Act. They are addressed under treaty stipulations to laborers only. Other classes are not included in their limitation and it was provided by treaty that the limitation or suspension of the entry of laborers should be reasonable. The questions therefore which could arise were deemed different from any under the Immigration Act, and the Exclusion Laws are adapted to them and their procedure is hence saved by Section 43."

In the recent case of *White v. Chin Fong, supra,* the Supreme Court speaks in this manner of the *Woo Jan* case:

> "In the case of United States v. Woo Jan, 245 U. S. 552, we had occasion to consider the difference between the situation of a Chinese person in the United States, and one seeking to enter it; and held that the former was entitled to a judicial inquiry and determination of his rights, and that the latter was subject to executive action and decision. We think the distinction is applicable here, and that one who had been in the United States and has departed from it with the intention of returning is entitled under existing legislation to have his right to do so judicially investigated with 'its assurances and sanctions', as contrasted with the discretion which may prompt or the latitude of judgment which may be exercised in executive action."

As affecting the present litigation we are confronted with the fact that Ng Fung Ho, a returning merchant with an investigated status as a merchant, would be entitled to a judicial determination of his right to re-enter, had that right been withheld. Can it by any parity of reasoning be held that his

rights are any less because of his regular entry upon the order of the commissioner? Can he be deported by a less formal proceeding than he is entitled to in asserting his right of entry? We think not. Ng Yuen Shew was landed upon appeal by the secretary as his son. As to Gin Sang Get and Gin Sang Mo, they are citizens, but their rights as such cannot be less than that of the alien merchant as has been held by this court in *Tsoi Sim v. U. S.,* 116 Fed. 920, 925. All of these remaining four appellants were regularly admitted into the United States by the appropriate immigration officials after due examination and determination of their respective rights of admission, and long after the consummation thereof. The action of the secretary is clearly against the explicit language of the Chinese Exclusion Law which requires a *judicial hearing and determination.* The conclusion of the decision in *White v. Chin Fong, supra,* is as follows:

> "The Government appeals against the explicit words of the provision of the exclusion laws, which is, it is said, to keep the country free from undesirable Chinese, or if they fraudulently enter, to expel them, and, it is insisted, that it would be a perfunctory execution of the purpose to let one in who may be immediately put out again. That intention, it is urged, should not be ascribed to the laws, and in emphasis, it is said, 'such a legislative absurdity is unthinkable'. But this overlooks the difference in the security of judicial over administrative action, to which we have adverted, and which this Court has declared, and in the present case the right that had been adjudged and had been exercised in reliance upon the adjudication."

There is a still more recently decided case by the Supreme Court, that of *Kwock Jan Fat v. White,* .....U. S....., decided June 7, 1920. In that case, which was of a native-born American citizen of the Chinese race seeking readmission, the court held:

> "It is better that many Chinese immigrants should be improperly admitted than that one natural born citizen of the United States should be permanently excluded from his country",

and concluded as follows:

> "The practice indicated in Chin Yow v. United States, 208 U. S. 8, is approved and adopted, the judgment of the Circuit Court of Appeals is reversed, and the cause is remanded to the District Court for trial of the merits."

These two decisions comprise what might be termed *the last word,* from the Supreme Court upon the subjects involved. We feel that they cannot but have a beneficial effect upon the rights of these appellants and that they are a sufficient warrant for the according of a judicial hearing for the final determination of the continued right of residence of all four of these petitioners and the continuation of the right of citizenship of the last two of appellants.

It is respectfully requested that a rehearing be accorded to these four petitioning appellants.

Dated, San Francisco,
August 4, 1920.

Respectfully submitted,

GEO. A. MCGOWAN,
Attorney for Appellants and Petitioners.

CERTIFICATE OF COUNSEL.

I hereby certify that I am counsel for appellants and petitioners in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that the said petition for a rehearing is not interposed for delay.

Dated, San Francisco,
August 4, 1920.

GEO. A. MCGOWAN,
Counsel for Appellants and Petitioners.

No. 3465

United States
Circuit Court of Appeals

For the Ninth Circuit.

MARY J. DILLON (Formerly MARY J. TYNAN) and THOMAS B. DILLON,

Plaintiffs in Error,

vs.

NORVENA LINEKER and FREDERICK V. LINEKER,

Defendants in Error.

Transcript of Record.

Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the Southern Division of the United States District Court for the Northern District of California.

NORVENA LINEKER and FREDERICK V. LINEKER,

Plaintiffs,

vs.

MARY J. DILLON (Formerly MARY J. TYNAN) and THOMAS B. DILLON,

Defendants.

Complaint.

Come now the plaintiffs above named and complain of the defendants, and for cause of action allege:

I.

That the plaintiffs Frederick V. Lineker and Norvena Lineker are both citizens of the Dominion of Canada and subjects of George IV, King of England, and aliens; that plaintiffs are informed and believe and therefore allege that the defendants are citizens of the State of California and of the United States, and reside in the Northern District of California.

II.

That the amount in controversy herein, exclusive of interest and costs, exceeds the sum of $3,000.00.

III.

That the plaintiff Norvena Lineker was married to the plaintiff Frederick V. Lineker on the 22d day of September, 1912, and ever since that date they have been and now are husband and wife; that prior

to the 22d day of September, 1912, the plaintiff Norvena Lineker's name was Norvena Svensen.

IV.

That the defendant Mary J. Dillon was married to Thomas B. Dillon in or about the month of June, 1918; but for more than nine years prior thereto her name was Mary J. Tynan.

V.

That for more than fifteen years prior to the commencement of [1*] this action the plaintiff Norvena Lineker has known the defendant Mary J. Dillon, formerly Mary J. Tynan; and for many years the plaintiff was well acquainted with one William Winter, son of said Mary J. Dillon, and for many years prior to, and at, the time she signed the note hereinafter mentioned, she was on terms of social intimacy with the said Mary J. Dillon and her son William Winter; that the said William Winter was a man of no wealth or means whatever and was in receipt of no income except small wages that he earned from work of various kinds.

VI.

That during all of said times the plaintiff Norvena Lineker was of pliable character and easily persuaded by those in whom she had trust and confidence; that she had had little or no business experience and was unable to properly manage or take care of her property, and that she was during all of said times likely to be deceived and imposed upon by artful and designing persons, and this weakness of character and susceptibility to imposition was well

*Page-number appearing at foot of page of original certified Transcript of Record.

known to the said defendant Mary J. Dillon and her son William Winter; that in or about the month of May, 1910, the plaintiff Norvena Lineker was in ill health and underwent a serious operation in the city of San Francisco, State of California; that while convalescing from said operation and illness she was taken by the defendant Mary J. Dillon to her home in the city of San Francisco to recuperate, and she remained at her house for some months; that during the time that she lived at the home of the defendant Mary J. Dillon, in the city and county of San Francisco, and before and after that time, the plaintiff Norvena Lineker (then Norvena Sevensen) reposed implicit confidence and trust in the said defendant Mary J. Dillon and her son William Winter, and during all of said time the said defendant Mary J. Dillon and said William Winter exercised great influence over the said plaintiff; that the said William Winter was during said time living at the home of his mother the said Mary J. Dillon.

VII.

That in the month of June, 1910, and for some months [2] prior and subsequent thereto, the plaintiff Norvena Lineker (then Norvena Svensen) was engaged to be married to the said William Winter.

VIII.

That on or about the 20th day of June, 1910, Norvena Lineker (then Norvena Svenson) was the owner of that certain piece and parcel of land, situate, lying and being in the county of Stanislaus, State of Cali-

fornia, and more particularly described as follows, to wit:

> All that portion of the Northwest quarter of Section Six (6) in Township Four (4) South, Range Nine (9) east, Mount Diablo Base and Meridian, lying North of the road in said County known as the Paradise Road.

That said property is farm land and for the last nine years has, for the most part, been unoccupied or untilled and during said time has produced little income or profit; but because of its situation and its close proximity to the center of the business district of the city of Modesto the said property is of large and increasing value.

That during all the times herein mentioned the said property was and now is of the value of $35,000.00 and upwards.

IX.

That the said property was on the said 20th day of June, 1910, subject to a life interest and estate therein in favor of one Ole Svensen, father of said plaintiff Norvena Lineker, and said property continued subject thereto until on or about the 7th day of August, 1916; that said Ole Svensen died on or about the 6th day of August, 1916, whereupon the said life estate of said Ole Svensen in said lands did terminate and end.

X.

That on the said 20th day of June, 1910, the plaintiff Norvena Lineker (then Norvena Svensen) was not in receipt of any income but was dependent for her support on moneys given to her by her father,

from time to time, in small amounts; that she had not since that time been in receipt of any income [3] sufficient even for her support until her marriage to the plaintiff Frederick V. Lineker; that the plaintiff Frederick V. Lineker is possessed of practically no means or estate, and he and the plaintiff Norvena Lineker are dependent almost entirely upon the wages earned by Frederick V. Lineker for their support and maintenance; that the defendant Mary J. Dillon was well acquainted with said plaintiff's financial condition during all of said times, and knew that said plaintiff during all of the times herein mentioned was in receipt of no income except as herein set forth; that said plaintiff has never been possessed of any property, means or estate other than as herein set forth.

XI.

That Mary J. Dillon, one of the above-named defendants, during the year 1910, and afterwards, was the owner of certain valuable land together with a hotel building thereon in the city of Modesto, county of Stanislaus, State of California, and that the said hotel building was in need of alterations, repairs and furnishings which would cost about $3,000.00 or more.

XII.

That the defendant Mary J. Dillon, being desirous of obtaining funds with which to make the repairs, alterations and improvements to her said hotel property, as aforesaid, in or about the month of June, 1910, conspired and confederated with her said son, William Winter, to induce said plaintiff Norvena Lineker (then Norvena Svensen) to borrow for the

use and benefit of the defendant Mary J. Dillon such funds by pledging her interest in said land above described as security therefor; and for that purpose it was agreed between said defendant Mary J. Dillon and said William Winter that the said William Winter was to tell the plaintiff Norvena Lineker (then Norvena Svensen) that if she would advance the money necessary to make repairs and improvements to the said hotel property of the defendants Mary J. Dillon, that his mother, the defendant Mary J. Dillon, would [4] put him in charge of said hotel property as manager thereof, and that he would then be in receipt of sufficient income to marry and support the said plaintiff, then Norvena Svensen, and from the receipts of said hotel he and his mother could easily pay off any money that Norvena Svensen would borrow for the purpose of making said repairs, alterations and improvements to the said hotel property of the said defendant Mary J. Dillon, and satisfy such debt, and that they would pay off all money so borrowed and satisfy such debt and that they would save her, the said plaintiff, harmless from any loss or damage in connection therewith; that said William Winter did in pursuance of such conspiring and confederating together thereafter make such statements and representations to said plaintiff Norvena Lineker (then Norvena Svensen).

XIII.

That believing such statements and representations to be true, and in order to repair, improve and furnish the hotel property belonging to the said defendant Mary J. Dillon, for the purposes aforesaid, the

plaintiff Norvena Lineker (then Norvena Svensen) did on or about the 20th day of June, 1910, at the request of the defendant Mary J. Dillon and said William Winter, borrow from Daniel A. McColgan the sum of $2,850.00, and then and there made and executed her promissory note in the sum of $2,850.00 to the said Daniel A. McColgan, and to secure the payment thereof did, on the said 20th day of June, 1910, make and execute an instrument in writing, to wit, a trust deed, whereby she conveyed all her interest in said real property to one R. McColgan, as trustee for said Daniel A. McColgan.

XIV.

That at the time of the execution of said note and said trust deed to R. McColgan, the plaintiff Norvena Lineker (then Norvena Svensen) was in ill health and weak in body and mind to such an extent as to render her unfit to transact business; that she did not understand and at that time she was incapable of understanding that the borrowing of said money would injuriously affect her interest in said real property; and such [5] condition of the body and mind of said plaintiff was well known to said defendant Mary J. Dillon and to her said son William Winter.

XV.

That the said William Winter was not a man of any estate or means during any of said times and was not entitled to credit in any sum whatsoever; which facts were well known to said Daniel A. McColgan and to said defendant Mary J. Dillon.

XVI.

That said plaintiff Norvena Lineker (then Norvena Svensen) received in cash from the said Daniel A. McColgan on or about said 20th day of June, 1910, the sum of $2,850.00, and upon receipt thereof immediately turned over the whole sum of $2,850.00 to said William Winter, for the use and benefit of said defendant Mary J. Dillon; and the whole amount thereof was received by said defendant Mary J. Dillon or was spent and expended at her direction and for her use and benefit in making repairs, additions and alterations to her said hotel property, and in furnishing the same.

XVII.

That in or about the month of January, 1911, the repairs, additions and alterations to the hotel property of the defendant Mary J. Dillon had been made and completed with the money borrowed by Norvena Lineker (then Norvena Svensen) for the said defendant; that within a few days after the said repairs had been completed the said defendant Mary J. Dillon took over complete charge and control of the said hotel property, and refused thereafter to permit the said William Winter to have the management or any control thereof or to receive any of the profits thereof or income therefrom, and the contemplated marriage between the said Norvena Svensen and the said William Winter was never entered into or performed. [6]

XVIII.

That the said Daniel A. McColgan did not cause the said trust deed to be recorded in the office of the

county recorder of Stanislaus County until on or about the 22d day of April, 1911; that on or about said 22d day of April, 1911, he demanded of Norvena Svensen that she forthwith pay to him the amount of said promissory note of $2,850.00, and interest thereon, and he then told her that if she failed to do so he would cause her interest in said property to be sold; that immediately after the said Daniel A. McColgan demanded the payment of said note the plaintiff Norvena Lineker (then Norvena Svensen) went to see the defendant Mary J. Dillon (then Mary J. Tynan), and demanded of her that she immediately pay and satisfy said note and interest, and procure the satisfaction and cancellation of said trust deed; and she, the said plaintiff, then and there told said defendant that if she failed to pay and satisfy said note forthwith and cause said trust deed to be satisfied and discharged, she, the said plaintiff, would immediately bring action against the said defendant Mary J. Dillon (then Mary J. Tynan) and her son William Winter to recover the amount of said note.

XIX.

That thereupon the defendant Mary J. Dillon (then Mary J. Tynan) asked and importuned said plaintiff Norvena Lineker (then Norvena Svensen) not to begin or prosecute any action against her, the said defendant Mary J. Dillon or her son William Winter, to recover said money borrowed on said note from Daniel A. McColgan and secured by said trust deed; and the said defendant Mary J. Dillon (then Mary J. Tynan) did then and there promise and agree to and with the said plaintiff Norvena Lineker

(then Norvena Svensen) that if she, the said plaintiff, would refrain from instituting or prosecuting any action against her, the said defendant or said William Winter [7] concerning said money secured by said trust deed, that she, the said defendant Mary J. Dillon (then Mary J. Tynan), would hold and save the said plaintiff Norvena Lineker (then Norvena Svensen) harmless from any and all loss or damage by reason of the making of said note or said trust deed; and that she, the said defendant Mary J. Dillon, would cause said debt and interest to be paid and discharged and would procure said trust deed to be paid and satisfied, and she, the said defendant Mary J. Dillon, would indemnify and save harmless the said Norvena Lineker (then Norvena Svensen) from any loss or damage whatsoever in connection with said note and trust deed.

XX.

That relying upon said defendant's promise to save her harmless from any and all loss, as aforesaid, the plaintiff Norvena Lineker (then Norvena Svensen) refrained from bringing any action to recover such money from said defendant Mary J. Dillon (then Mary J. Tynan) or her son William Winter, or either of them, and she has not since commenced or prosecuted such action.

XXI.

That thereafter the said Daniel A. McColgan took various proceedings under the said trust deed, for the purpose of obtaining the money secured thereby, and large expense was incurred in connection therewith;

that several adjournments of the sale of said property, under said trust deed, were had from time to time, and further expense thereby incurred; and further expense for attorney's fees, and the like, were incurred by said plaintiff in an endeavor to prevent a sale of said property and a loss thereof to said plaintiff; that thereafter the said Daniel A. McColgan caused said property to be sold under said trust deed, and various other proceedings were had and taken by and on behalf of the said Daniel A. McColgan which resulted in this plaintiff, Norvena Lineker, being deprived of possession of said land and of her interest therein, and of the rents, issues and profits thereof, to her loss and damage in the sum of $35,000.00. [8]

XXII.

That the defendant Mary J. Dillon failed and neglected to pay off said indebtedness incurred for her use and benefit, and failed and neglected to pay off said note or the interest which accumulated thereon, and failed to pay or satisfy said trust deed, and said defendant Mary J. Dillon has failed to hold or save the plaintiff harmless from any or all loss caused to or incurred by the said plaintiff on connection with said note and trust deed made by her in favor of said Daniel A. McColgan, to the loss and damage to the said plaintiff Norvena Lineker in the sum of $35,000.00.

WHEREFORE, plaintiffs pray judgment against the said defendants in the sum of $35,000.00 and their costs and disbursements herein.

JOHN L. TAUGHER,
Plaintiffs' Attorney.

United States of America,
Northern District of California,—ss.

Norvena Lineker, being first duly sworn, deposes and says: That she is one of the plaintiffs named in the above-entitled action; that she has read the foregoing complaint, and knows the contents thereof, and that the same is true of her own knowledge, except as to matters therein stated on information and belief, and that as to those matters she believes it to be true.

NORVENA LINEKER.

Subscribed and sworn to before me, this 26th day of October, A. D. 1918.

[Seal] H. S. WIGGINS,
Notary Public in and for the County of Alameda, State of California.

[Endorsed]: Filed Oct. 30, 1918. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [9]

UNITED STATES OF AMERICA.

In the Southern Division of the United States District Court for the Northern District of California.

NORVENA LINEKER and FREDERICK V. LINEKER,

Plaintiffs,

vs.

MARY J. DILLON (Formerly MARY J. TYNAN) and THOMAS B. DILLON,

Defendants.

Action brought in said District Court, and the Complaint filed in the office of the Clerk of said District Court, in the City and County of San Francisco.

JOHN L. TAUGHER,
Plaintiffs' Attorney.

Summons.

The President of the United States of America, GREETING: To Mary J. Dillon (Formerly Mary J. Tynan) and Thomas B. Dillon, Defendants.

YOU ARE HEREBY DIRECTED TO APPEAR, and answer the complaint in an action entitled as above, brought against you in the Southern Division of the United States District Court for the Northern District of California, Second Division, within ten days after the service on you of this summons—if served within this county; or within thirty days if served elsewhere.

And you are hereby notified that unless you appear and answer as above required, the said plaintiffs will take judgment for any moneys or damages demanded in the complaint, as arising upon contract, or they will apply to the court for any other relief demanded in the complaint.

WITNESS the Honorable WILLIAM C. VAN FLEET, Judge of said District Court, this 30th day of October, in the year of our Lord one thousand nine hundred and eighteen and of our Independence the

one hundred and forty-third.

[Seal] WALTER B. MALING,
Clerk.
By J. A. Schaertzer,
Deputy Clerk. [10]

United States Marshal's Office,
Northern District of California.

I HEREBY CERTIFY, that I received the within writ on the 30th day of Oct., 1918, and personally served the same on the 31st day of October, 1918, upon Mary J. Dillon, Thos. Dillon, each, by delivering to, and leaving with Mary Dillon, Thos. Dillon, each, said *defendant* named therein personally, at the city of Modesto, county of Stanislaus *County*, in said District, a certified copy thereof, together with a copy of the complaint, attached thereto.

J. B. HOLOHAN,
U. S. Marshal.
By Frank J. Ralph,
Office Deputy.

San Francisco, Nov. 1st, 1918.

[Endorsed]: Filed Nov. 1, 1918. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [11]

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

NORVENA LINEKER and FREDERICK V. LINEKER,

Plaintiffs,

vs.

MARY J. DILLON (Formerly MARY J. TYNAN) and THOMAS B. DILLON,

Defendants.

Answer.

Come now the defendants Mary J. Dillon (formerly Mary J. Tynan) and Thomas B. Dillon, and answering the complaint of plaintiffs deny and allege as follows, to wit:

I.

Defendants have no information or knowledge sufficient to enable them to answer whether or not Frederick V. Lineker and Norvena Lineker are both citizens of the Dominion of Canada and subjects of George IV, King of England, and aliens, and therefore deny that Frederick V. Lineker and Norvena Lineker, or either of them, are citizens of the Dominion of Canada, and subjects of George IV, King of England, and aliens.

II.

Deny that at all the times mentioned in the complaint Norvena Lineker was of a pliable character and easily persuaded by those in whom she had trust and confidence. Defendants have no informa-

tion as to whether or not she had little or no business experience and was unable to manage and take care of her property, and therefore deny that she had little or no business experience, and deny that she was unable to manage or take care of her property. Deny that she was at all of the times mentioned in the complaint likely to be deceived and imposed upon or imposed upon by artful and designing or artful or designing persons, and deny that this weakness of character and susceptibility to imposition was well known or known at all to defendant, Mary J. Dillon, or to her son, William Winter. Deny that during the time that Norvena Lineker lived at the home [12] of the defendant Mary J. Tynan, in the city and county of San Francisco, or at any other place, or before or after that time, or at all, the plaintiff Norvena Lineker, then Norvena Svenson, imposed implicit confidence and trust or any trust and confidence in the said Mary J. Tynan, or her son, William Winter. Deny that during all of said time or any of said time or at all the defendant Mary J. Dillon and William Winter, or either of them, exercised great or any influence over the plaintiff.

III.

Deny that in the month of June, 1910, or at any other time, or at all, the plaintiff Norvena Lineker, then Norvena Svensen, was engaged to be married to the said William Winter. Deny that at all the times mentioned in the complaint or at any time at all the real estate described in paragraph VIII was of the value of $35,000 and upward or was of

any value whatever in excess of $24,000.

IV.

Defendants have no information or knowledge sufficient to enable them to answer whether or not on the 20th day of June, 1910, the plaintiff Norvena Lineker was not in receipt of any income, but was dependent upon moneys given her by her father from time to time for her support, and therefore deny that on the 20th day of June, 1910, or at any other time the plaintiff Norvena Lineker was not in receipt of any income. Defendants deny that since said time she has not been in receipt of any income sufficient for her support, but, on the contrary, allege that she has received large sums of money subsequent to the 20th day of June, 1910, and prior to her marriage with Frederick V. Lineker. Defendants have no information sufficient to enable them to answer whether or not plaintiff Frederick V. Lineker is possessed of practically no means or estate or whether or not plaintiff Norvena Lineker and said Frederick V. Lineker are dependent almost entirely upon the wages earned by Frederick V. Lineker for their support and [13] maintenance, and therefore deny the whole thereof.

V.

Deny that Mary J. Dillon was well acquainted or acquainted at all with plaintiff's financial condition during all of the times mentioned in the complaint or knew that the plaintiff Norvena Lineker was in receipt of no income. Defendants have no information sufficient to enable them to answer whether or not plaintiff has never been possessed of any prop-

erty, means or estate other than set forth in the complaint; and therefore deny that plaintiff Norvena Lineker has never been possessed of any property, means or estate other than as set forth in the complaint.

VI.

Deny that on or about the month of June, 1910, or at any other time at all, Mary J. Dillon conspired or confederated or conspired or confederated with her son, William Winter, to induce plaintiff Norvena Lineker to borrow for the use and benefit or use or benefit of defendant Mary J. Dillon any sums of money at all by pledging her interest in the land described in the complaint as secured therefor, or by any other means. Deny that for that purpose it was agreed between the defendant Mary J. Dillon and William Winter that the said William Winter was to tell plaintiff Norvena Lineker that if she would advance money necessary to make repairs and improvements on said hotel property of defendant Mary J. Dillon, that defendant Mary J. Dillon would put William Winter in charge of said hotel property as manager thereof, or that he would then be in receipt of sufficient income to marry and support plaintiff, Norvena Lineker, or from the receipts of said hotel he and his mother could easily pay off any money that Norvena Svensen would procure for the purpose of making said repairs, alterations and improvements to the hotel property of the said defendant, Mary J. Dillon, and satisfy such debts, or that they would pay off all money so borrowed and satisfy such debt, or that they would save the said

plaintiff harmless from any loss or damage in connection therewith. Deny that the said William Winter in pursuance of the alleged conspiracy and confederation or at all thereafter made such statement and [14] representation or any statement or representation to the said plaintiff, Norvena Lineker. Deny that any such conspiracy existed. Deny that any such statements were made. Deny that Norvena Lineker believed any such statements or representations to be true. Deny that in order to repair, improve and furnish or repair or improve or furnish the hotel property belonging to the *property* Mary J. Dillon for the purpose mentioned in the complaint, or at all, the plaintiff Norvena Lineker did on or about the 20th day of June, 1910, or at any other time or at all, at the request of Mary J. Dillon and the said William Winter or Mary J. Dillon or the said William Winter borrow from Daniel A. McColgan the sum of $2,850 or any other sum at all, and deny that then and there she made and executed her promissory note for the sum of $2,850 to the said Daniel A. McColgan for the purpose aforesaid, or for any purpose connected with defendant Mary J. Dillon, and deny that for any such purposes the said plaintiff to secure the payment thereof, did on the 20th day of June, 1910, or at any other time make and execute a trust deed wherein she conveyed all her interest in said real property to one R. McColgan as trustee for Daniel A. McColgan.

VII.

Defendants have no information or knowledge

sufficient to enable them to answer paragraph XIV of the complaint, and therefore deny that at the time of the execution of said note from said Norvena Lineker and said trust deed to R. McColgan, the plaintiff Norvena Lineker was in ill health or weak in body and mind or body or mind to such an extent as to render her unfit to transact business, or that she did not understand or was not at that time capable of understanding that the borrowing of said money would injuriously affect her interest in said real property. Deny that such condition of body and mind of said plaintiff was well known to Mary J. Dillon, or known at all to said Mary J. Dillon, and her son, William Winter, or either of them. [15]

VIII.

Deny that the said William Winter was not a man of any estate or means during any of the times mentioned in the complaint and deny that he was not entitled to credit in any sum whatsoever.

IX.

Defendants have no information sufficient to enable them to answer paragraph XVI of the complaint, and therefore deny that Norvena Lineker received in cash from Daniel A. McColgan on or about the 20th day of June, 1910, the sum of $2,850 or any sum at all. Deny that upon the receipt of such sum plaintiff, Norvena Lineker, turned over the whole sum of $2,850 to William Winter for the use and benefit of Mary J. Dillon or for any other purpose at all. Deny that Mary J. Dillon received any part or portion whatever of said sum of $2,850,

and deny that she spent or expended any part or portion of any sum of money received by William Winter from Norvena Lineker or received by herself from Norvena Lineker. Deny that the whole amount of $2,850 or any part thereof was received by the defendant, Mary J. Dillon, or was spent or expended at her direction or for her use and benefit in making repairs or additions or alterations on her hotel property, and in furnishing the same or in any other manner or for any other purpose whatever.

X.

Deny that in the month of January, 1911, or at any other time or at all, the repairs, additions and alterations on the hotel property of the defendant, Mary J. Dillon, had been made and completed or made or completed with the money borrowed by Norvena Lineker for the defendant Mary J. Dillon. Deny that within a few days after said repairs had been completed defendant Mary J. Dillon took over complete charge and control of said hotel property and refused thereafter to permit the said William Winter to have the management thereof, or to receive any of the profits or income therefrom, contrary to any agreement that Mary J. Dillon had with either the said William Winter or [16] Norvena A. Lineker, but, on the contrary, defendants allege that no such agreement ever existed, and defendants admit that the said Mary J. Dillon at all times mentioned in the complaint was in charge of said hotel property, and owned the same and conducted the same for her own use and for her own benefit, but she never promised or agreed with William

Winter or with Norvena Lineker that the said William Winter should have complete charge and control of said hotel property or should have any charge or control thereof. Defendants deny that at any time any contemplated marriage between Norvena Svensen and William Winter was broken off.

XI.

Defendants have no information or knowledge sufficient to enable them to answer paragraph XVIII of the complaint and therefore deny that the said Daniel A. McColgan did not cause said deed of trust to be recorded in the office of the County Recorder of Stanislaus County, California, until on or about the 22d day of April, 1911. Deny that on or about the 22d day of April, 1911, he demanded of Norvena Svensen that she forthwith pay to him the amount of said promissory note of $2,850 with interest thereon, or that he told her that if she failed to do so he would cause her interest in said property to be sold. Deny that immediately or at all after the said Daniel A. McColgan demanded the payment of said note, the plaintiff Norvena Svensen went to see the defendant Mary J. Dillon, and demanded of her that she immediately pay and satisfy said note or procure the satisfaction and cancellation of said deed of trust, or that she, the said plaintiff, then and there, or at all, told defendant that if she failed to pay for said note or satisfy said note forthwith or cause said deed of trust to be satisfied and discharged she, the said plaintiff, would immediately bring action against defendant Mary J. Dillon and her son William Winter to recover the

amount of said note. Deny that thereupon or at all or at any time or place defendant [17] Mary J. Dillon, then Mary J. Tynan, asked or importuned or asked or importuned the said Norvena Lineker, then Norvena Svensen, not to begin or prosecute any action against her the said defendant Mary J. Dillon or her son, William Winter, to recover the alleged money, alleged to have been borrowed on said note from Daniel A. McColgan and secured by said deed of trust. Deny that the defendant Mary J. Dillon (then Mary J. Tynan) did then and there or at any other time or place promise and agree or promise or agree to and with or to or with the said plaintiff, Norvena Lineker (then Norvena Svensen), that if she, the said plaintiff, would refrain from instituting or prosecuting any action against her, the said defendant, and William Winter concerning said money secured by said deed of trust that she, the said defendant Mary J. Dillon (then Mary J. Tynan), would hold and save or hold or save the said plaintiff Norvena Lineker, then Norvena Svensen, harmless from any or all loss or damage by reason of the making of said note or deed of trust; or that she, the said defendant Mary J. Dillon, would cause said debt and interest to be paid and discharged or would procure said deed of trust to be paid or satisfied. Deny that defendant, Mary J. Dillon, promised or agreed that she would indemnify and save harmless or indemnify or save harmless the said Norvena Lineker, then Norvena Svensen, from any loss or damage whatsoever in connection with said note and trust deed or with said note or trust deed.

Deny that the said Norvena Lineker relied upon the alleged promise of defendant. Deny that relying upon said defendant's alleged promise to save her harmless from any or all loss, the plaintiff Norvena Lineker, then Norvena Svensen, refrained from bringing any action to recover said money from said defendant, Mary J. Dillon, then Mary J. Tynan, or her son, William Winter, or either of them. Deny that plaintiff Norvena Lineker has not prosecuted such an action or commenced such an action.

XII.

Defendants have no information sufficient to enable them [18] to answer paragraph XXI of the complaint and therefore deny that thereafter or at all Daniel A. McColgan took various proceedings under said deed of trust for the purpose of obtaining the money secured thereby; and large expenses were incurred in connection therewith. Deny that further expense was thereby incurred. Deny that further expense or attorneys' fees and the like were incurred by the said plaintiff in an endeavor to prevent a sale of said property and a loss thereof to said plaintiff. Deny that thereafter the said Daniel A. McColgan caused said property to be sold under a deed of trust or that various other proceedings were had and taken by and on behalf of said Daniel A. McColgan which resulted in plaintiff, Norvena Svensen, now Norvena Lineker, being deprived of possession of said land and her estate or interest therein, or of the rents, issues or profits thereof to her loss or damage in the sum of $35,000, or any other sum at all. But, on the contrary this defend-

ant alleges that long prior to the sale of any land under the alleged deed of trust in an action wherein one Williams was plaintiff and Norvena Lineker was defendant, a judgment was procured against the said Norvena Lineker for a sum of money the exact amount of which is unknown to these defendants, and that execution was levied upon the real estate described in the complaint herein and said real estate was sold at public auction pursuant to the statute in such cases made and provided, and a certificate of purchase was duly issued to the purchaser at such sale and more than one year elapsed after said sale and no redemption was made under said judgment, execution or certificate of sale and a deed was thereupon issued and delivered to and recorded by the purchaser and at the date of the sale of said property under said deed of trust the said Norvena Lineker had no right, title, estate, claim or interest in and to said land and premises or any part or portion thereof. [19]

XIII.

Deny that the defendant, Mary J. Dillon, failed and neglected to pay off any indebtedness incurred for her use and benefit or use and benefit or failed or neglected to pay off any obligation incurred by her at all. Deny that by reason of any failure by the defendant, Mary J. Dillon, to keep any promise or agreement made by her to the plaintiffs, or either of them, or Norvena Lineker, they have been damaged in the sum of $35,000 or any sum at all.

And for another and separate defense to said action, defendants allege:

I.

That long prior to the alleged sale under said deed of trust the said Norvena Lineker parted with all title to said real estate and the whole thereof, and she made, executed and delivered a deed to the whole of said premises to one Frederick V. Lineker and she never thereafter acquired any right, title, estate or interest in and to said land and premises or any part thereof; that at the time of the alleged sale of said property under said deed of trust by the said Daniel A. McColgan neither of the plaintiffs had any right, title, estate or interest therein or to any part or portion thereof; that after the execution of said deed of trust the said Norvena Lineker from time to time procured other advances thereunder until the amount due upon said deed of trust was in excess of the sum of $7,000.

And as a separate defense to the cause of action set out in plaintiff's complaint and as a bar thereto, the defendant herein alleges as follows, to wit:

I.

That the defendant, Mary J. Dillon, was formerly Mary J. Tynan, and on the 11th day of June, 1912, she was Mary J. Tynan and continued to be Mary J. Tynan for a long time subsequent to the 4th day of August, 1914. [20]

II.

That on the 11th day of June, 1912, she filed with the clerk of the Superior Court of the State of California, in and for the County of Stanislaus, a complaint, which complaint was entitled "In the Superior Court of the County of Stanislaus, State of

California," and this defendant, Mary J. Dillon, was plaintiff in said action, being known therein as Mary J. Tynan, and Norvena E. Lineker was the defendant in said action; that at said time Norvena E. Lineker had not been married and her name was Norvena E. Svensen; that said complaint is in the words and figures following, to wit:

"*In the Superior Court of the County of Stanislaus, State of California.*

MARY J. TYNAN,

Plaintiff,

vs.

NORVENA E. SVENSEN,

Defendant.

COMPLAINT.

The plaintiff above named complains of the defendant above named and for cause of action alleges:

I.

That at all times herein mentioned said defendant was and now is a resident of the county of Stanislaus, State of California.

II.

That on the 5th day of December, 1911, at Modesto, in the said county of Stanislaus, State of California, defendant made, executed and delivered to plaintiff defendant's certain promissory note in the words and figures following, to wit:

"$774.65. Modesto, Cal., Dec. 5th, 1911.

One day after date, without grace, for value received, I promise to pay to the order of Mary J.

Tynan, at Modesto, Cal., Seven Hundred Seventy-four and 65/100 Dollars with interest thereon from date until paid, at the rate of eight per [21] cent per annum, said interest to be paid annually, and if not paid as it becomes due to be added to the principal and become a part thereof and bear interest at the same rate; but if default be made in the payment of the interest as above provided, then this note shall become due at the option of the holder thereof; also to pay all legal expenses and attorneys' fees which may be incurred in the collection of this note. All payments which become due by virtue hereof are to be paid in United States Gold Coin.

NORVENA E. SVENSEN."

III.

That said promissory note, or any part thereof, has not been paid and that the same and the whole thereof is now due and unpaid.

IV.

That plaintiff has been compelled to employ attorneys to collect said promissory note that plaintiff has employed the firm of Hatton & Scott, attorneys at law, in said matter; that the sum of $250 is a reasonable attorney's fee herein.

And for another, further and separate cause of action against the defendant, the plaintiff alleges:

I.

That at the times herein mentioned said defendant was and now is a resident of the county of Stanislaus, State of California.

That defendant is indebted to plaintiff in the sum

of one hundred forty (140) dollars for board and room furnished by plaintiff to defendant at defendant's special instance and request; that said board and room were so furnished by plaintiff to defendant within two years immediately preceding the commencement of this action.

III.

That said sum of one hundred forty (140) dollars or any part thereof has not been paid and that the same and the whole thereof is now due and unpaid.

[22]

And for another, further and separate cause of action against defendant, plaintiff alleges:

I.

That at all the times herein mentioned the defendant was and now is a resident of the county of Stanislaus, State of California.

II.

That defendant is indebted to the plaintiff in the sum of seventy-five (75) dollars for moneys paid by plaintiff to defendant for the use of the defendant at the special instance and request of defendant; that said sum of seventy-five (75) dollars was so paid by plaintiff to defendant and to and for the use of defendant within two years immediately preceding the commencement of this action.

III.

That said sum of seventy-five (75) dollars or any part thereof has not been paid and that the same and the whole thereof is now due and unpaid.

WHEREFORE, plaintiff prays judgment against said defendant for the sum of seven hundred four

and 65/100 (774.65) dollars, together with interest thereon at the rate of eight per cent per annum from the 5th day of December, 1911, and for the further sum of one hundred forty (150) dollars for board and room as aforesaid, and the further sum of seventy-five (75) dollars for money advanced and paid to defendant and to and for the use of defendant by plaintiff as aforesaid, and for the sum of two hundred fifty (250) dollars attorney's fee as above set forth and for costs of suit herein.

HATTON & SCOTT,
Attorneys for Plaintiff. [23]

State of California,
County of Stanislaus,—ss.

Mary J. Tynan, being duly sworn, deposes and says: That she is the plaintiff in the above-entitled action; that she has read the above and foregoing complaint and knows the contents thereof; that the same is true of her own knowledge, except as to the matters therein stated on her information and belief and as to these matters that she believes it to be true.

MARY J. TYNAN.

Subscribed and sworn to before me this 10th day of June, 1912.

[Notarial Seal] W. H. HATTON,
Notary Public in and for the County of Stanislaus, State of California.

III.

That thereafter and on the 11th day of May, 1914, the said defendant, Norvena E. Svensen, filed with

the clerk of said court her answer to the complaint, which answer was in the words and figures following, to wit:

"In the Superior Court of the County of Stanislaus, State of California.

No. 3666.

MARY J. TYNAN,

Plaintiff,

vs.

NORVENA E. SVENSEN,

Defendant.

Comes now the defendant above named and answering the complaint of plaintiff on file herein alleges, admits and denies as follows:

I.

As to paragraph III of said complaint the said defendant denies that said note has not been paid, or any part thereof, either principal or interest, but alleges on the contrary that the said plaintiff is indebted to this defendant in the sum of [24] $4,000 for money loaned, paid out and expended for and on account of the said plaintiff at her special instance and request, which amount has not yet been paid.

II.

Denies that $250 is a reasonable attorney's fee or that any sum at all is a reasonable attorney's fee or that the said plaintiff is entitled to attorneys' fees at all.

And further answering the said complaint and by way of counterclaim the said defendant alleges:

I.

That the said plaintiff is indebted to the said defendant in the sum of $4,000.00 for money advanced, paid out and expended for and on account of said plaintiff at her special instance and request, which amount said plaintiff has not paid.

II.

That said defendant alleges that the said Mary J. Tynan and William Winter were partners managing a certain building in the city of Modesto, known as the Tynan Hotel, and that while the said William Winter was acting as agent and manager for the said plaintiff he obtained from this defendant a sum in excess of $4,000 with the knowledge and consent of said plaintiff, and that said amount was expended in improving, renovating and repairing the said Tynan Hotel, and that said Tynan Hotel belongs now and at said time did belong to the said Mary J. Tynan, and that the money was expended for her benefit and for her account, and was received by her, and that she has not paid the same, or any part thereof.

III.

That the said defendant alleges that since the filing of said complaint that she has married and her name is now Norvena E. Lineker.

WHEREFORE, said defendant prays that the said plaintiff take nothing by this said action, and that the said defendant have judgment against her for the sum of $4,000, together with [25] interest

thereon at the rate of seven per cent from the 20th day of June, 1910, and for costs of suit.

L. L. DENNETT,
Attorney for Defendant.

State of California,
County of Alameda,—ss.

Norvena E. Lineker, formerly Norvena E. Svensen, being duly sworn, deposes and says: That she is the defendant in the above-entitled answer; that she has read the same and knows the contents thereof and the same is true of her own knowledge, except as to those matters therein stated on information and belief and as to those that she believes it to be true.

NORVENA E. LINEKER.

Subscribed and sworn to before me this 9th day of May, 1914.

[Notarial Seal] M. D. NICHOLS,
Notary Public in and for the County of Alameda, State of California.

IV.

That thereafter on the 25th day of July, 1914, and by consent of the parties to said action the plaintiff filed a supplement to the complaint, which supplement is in the words and figures following, to wit:

"In the Superior Court of the County of Stanislaus, State of California.

MARY J. TYNAN,

Plaintiff,

vs.

NORVENA E. LINEKER, Formerly NORVENA E. SVENSEN,

Defendant.

SUPPLEMENT TO COMPLAINT.

Prior to the trial of the above-entitled cause, it was stipulated and agreed by the parties hereto, in open court, that the plaintiff file a supplement to the complaint in said [26] action, which said complaint was filed in the above-entitled Superior Court on the 11th day of June, 1912, and that said supplement to said complaint be considered as filed prior to the said trial of said cause and that the facts alleged in said supplement be admitted by the defendant, and that said supplement be as follows, to wit:

To the first cause of action set forth in said complaint: That subsequent to said 5th day of December, 1911, and subsequent to the filing of the complaint herein on the 11th day of June, 1912, the said defendant married and that defendant's name is now Norvena E. Lineker.

To the second cause of action set forth in said complaint:

That subsequent to the 5th day of December, 1911, and subsequent to the filing of the complaint herein

on the 11th day of June, 1912, the said defendant married and that defendant's name is now Norvena E. Lineker.

To the third cause of action set forth in said complaint:

That subsequent to the 5th day of December, 1911, and subsequent to the filing of the complaint herein on the 11th day of June, 1912, the said defendant married and that defendant's name is now Norvena E. Lineker.

It was further stipulated and agreed in open court by said parties prior to the trial of said action, that in all matters or proceedings in said cause subsequent to said stipulation that the said defendant should be named and designated as Norvena E. Lineker, formerly Norvena E. Svensen.

HATTON & SCOTT,
Attorneys for Plaintiff. [27]

State of California,
County of Stanislaus,—ss.

Mary J. Tynan, being duly sworn, deposes and says: That she is the plaintiff in the above-entitled action; that she has read the above and foregoing supplement to the complaint herein and knows the contents thereof; that the same is true of her own knowledge, except as to the matters therein stated on her information and belief and as to these matters that she believes it to be true.

MARY J. TYNAN.

Subscribed and sworn to before me this 25th day of July, 1914.

[Notarial Seal] T. B. SCOTT,
Notary Public in and for the County of Stanislaus, State of California."

That said supplement to said complaint was duly served upon L. L. Dennett on the 25th day of July, 1914, and at said time L. L. Dennett was the attorney for Norvena E. Lineker.

V.

That a trial was had upon the issues formed by said complaint and the answer aforesaid on the 24th day of July, 1914, and evidence was taken at said trial. Whereupon the Court made and entered its findings of fact on the 4th day of August, 1914, which said findings of fact are in words and figures following, to wit:

"*In the Superior Court of the County of Stanislaus, State of California.*

No. 3666.

MARY J. TYNAN,

Plaintiff,

vs.

NORVENA E. LINEKER, Formerly NORVENA E. SVENSEN,

Defendant.

FINDINGS.

This cause came on regularly for trial on the 24th [28] day of July, 1914, before the Court, Hon. L. W. Fulkerth, Judge presiding. A jury was waived

by the parties hereto and the cause was tried before the Court sitting without a jury. Evidence, oral and documentary, was introduced by the various parties, and the Court now being fully advised in the premises, renders this decision in writing and finds from the evidence the following facts:

FINDINGS OF FACT.

I.

That at all the times herein mentioned in the complaint filed herein said defendant was a resident of the County of Stanislaus, State of California.

II.

That subsequent to the 5th day of December, 1911, and subsequent to the filing of the complaint in this action on the 11th day of June, 1912, the said defendant, Norvena E. Svensen, married and that the name of defendant at said trial of this cause was and now is Norvena E. Lineker.

III.

That prior to the said trial of said cause it was stipulated and agreed by the parties hereto, in open court, on said 24th day of July, 1914, that in all matters or proceedings in said cause subsequent to the aforesaid stipulation, the defendant should be named and designated as Norvena E. Lineker, formerly Norvena E. Svensen.

IV.

That on the 5th day of December, 1911, at Modesto, in said county of Stanislaus, State of California, defendant made, executed and delivered to plaintiff defendant's certain promissory note in the words and figures following, to wit:

$774.65. Modesto, Cal., Dec. 5th, 1911.

One day after date, without grace, for value received, I promise to pay to the order of Mary J. Tynan, at Modesto, Cal., Seven Hundred Seventy-four and 65/100 Dollars, with interest [29] thereon from date until paid, at the rate of eight per cent per annum, said interest to be paid annually, and if not paid as it becomes due to be added to the principal and become a part thereof, and bear interest at the same rate, but if default be made in the payment of the interest as above provided, then this note shall become due at the option of the holder thereof; also to pay all legal expenses and attorneys' fees which may be incurred in the collection of this note. All payments which become due by virtue hereof are to be paid in United States Gold Coin.

NORVENA E. SVENSEN.

V.

That said promissory note, or any part thereof, has not been paid and that the same and the whole thereof, is now due and unpaid.

VI.

That plaintiff has been compelled to employ attorneys to collect said promissory note and has thereby incurred attorney's fee for the collection of the same; that plaintiff has employed the firm of Hatton & Scott, attorneys at law, in said matter; that the sum of $100 is a reasonable attorney's fee herein.

VII.

The defendant is indebted to the plaintiff in the

sum of one hundred forty (140) dollars for board and room furnished by plaintiff to defendant at defendant's special instance and request; that said board and room were so furnished by plaintiff to defendant within two years immediately preceding the commencement of this action.

VIII.

That said sum of one hundred forty (140) dollars or any part thereof has not been paid, and that the same and the whole thereof is now due and unpaid.

IX.

That defendant is indebted to plaintiff in the sum of [30] seventy-five (75) dollars for moneys paid by plaintiff to defendant and for the use of defendant at the special instance and request of defendant; that said sum of seventy-five (75) dollars was so paid by plaintiff to defendant to and for the use of the defendant within two years immediately preceding the commencement of this action.

X.

That said sum of seventy-five (75) dollars or any part thereof has not been paid and that the same and the whole thereof is now due and unpaid.

XI.

That plaintiff is not indebted to defendant in the sum of four thousand (4,000) dollars, or in any sum or amount whatever.

XII.

That plaintiff and one William Winter were not at any time partners in the management of the Tynan Hotel; that said William Winters was not agent or manager for plaintiff in managing or con-

ducting said Tynan Hotel; that William Winters did not obtain from said defendant any moneys whatever as agent or manager for plaintiff; that said William Winters did not obtain from defendant any money or moneys whatever with the knowledge or consent of plaintiff or by or under the authority of plaintiff; that there was not expended in the improving or renovating or repairing the said Tynan Hotel, or for the benefit of plaintiff or for the account of plaintiff or received by plaintiff any money or moneys whatever obtained from defendant; that said Tynan Hotel now belongs to and at all times mentioned in the pleadings herein did belong to the said plaintiff, Mary J. Tynan.

CONCLUSIONS OF LAW.

I.

That plaintiff is not indebted to defendant in any sum or amount whatever. [31]

II.

That defendant is indebted to plaintiff and that plaintiff have judgment against defendant in the following amounts, to wit: In the sum of seven hundred seventy-four and 65/100 (774.65) dollars, with interest thereon from the 5th day of December, 1911, at the rate of eight per cent per annum; in the further sum of one hundred (100) dollars, attorney's fees allowed by the court; in the further sum of one hundred forty (140) dollars; in the further sum of seventy-five (75) dollars.

III.

That the total amount of indebtedness due from the defendant to plaintiff on the 24th day of July,

1914, was and is the sum of one thousand two hundred sixty-four and 9/100 (1264.91) dollars.

That plaintiff have judgment for said sum of $1,264.91 and her costs herein.

Let judgment be entered accordingly.

L. W. FULKERTH,
Judge of the Superior Court.

Dated August 4th, 1914.

VI.

That said findings were duly filed with the clerk of said Court on August 4th, 1914, and entered on said date.

VII.

That thereafter and on the 4th day of August, 1914, L. W. Fulkerth, Judge of said Superior Court in said cause, duly made judgment, which said judgment is in the words and figures following, to wit:

"In the Superior Court of the County of Stanislaus, State of California.

No. 3666.

MARY J. TYNAN,

Plaintiff,

vs.

NORVENA E. LINEKER, Formerly NORVENA E. SVENSON,

Defendant.

This cause came on for trial on the 24th day of July, A. D. 1914, Messrs. Hatton & Scott, appearing as counsel for plaintiff and L. L. Dennett, Esq., appearing for defendant. [32] A trial by jury hav-

ing been waived, it was tried before the Court. Whereupon witnesses on the part of plaintiff and defendant were sworn and examined and documentary evidence introduced by the respective parties, the defense being closed, the cause was submitted to the Court for consideration and decision and after deliberation thereon the Court filed its findings and decisions in writing and ordered that judgment be entered herein in favor of plaintiff in accordance therewith.

WHEREFORE, by reason of the law and the findings aforesaid, it is ordered, adjudged and decreed that Mary J. Tynan, the plaintiff, do have and recover of and from Norvena E. Lineker, formerly Norvena E. Svensen, the defendant, the sum of one thousand *and* two hundred and sixty-four and 91/100 (1264.91) dollars, with interest thereon at the rate of seven per cent per annum from date hereof until paid, together with said plaintiff's costs and disbursements incurred in this action amounting to the sum of $15.

Judgment recorded August 4th, A. D. 1914.

L. W. FULKERTH,

Judge of the Superior Court."

That said judgment was filed in the office of the clerk of said court on the 4th day of August, 1914, and was recorded in Judgment Book V at page 33, records of the Superior Court of the State of California, in and for the county of Stanislaus. That thereupon a judgment-roll was duly made and entered on the 4th day of August, 1914.

VIII.

That said judgment has never been appealed from, vacated, annulled, or set aside or modified and said judgment is now in full force and effect and no part thereof has been paid and the whole of said judgment is now due, owing and unpaid from the said Norvena E. Lineker, formerly Norvena E. Svensen, to the said Mary J. Tynan, who is now named Mary J. Dillon.

And as another and further defense to said action and as [33] a bar to the cause of action set forth in the complaint or petition of the plaintiff, the defendant Mary J. Dillon alleges as follows:

I.

That on the 28th day of March, 1913, Mary J. Tynan, now Mary J. Dillon, filed in the office of the county clerk of the county of Stanislaus, State of California, a complaint wherein the said Mary J. Tynan was plaintiff and Norvena E. Lineker was defendant, which said complaint was entitled, "In the Superior Court of the County of Stanislaus, State of California. Mary J. Tynan, Plaintiff, vs. Norvena E. Lineker, Formerly Norvena E. Svensen, Defendant," and which complaint was in the words and figures following, to wit:

"In the Superior Court of the County of Stanislaus, State of California.

MARY J. TYNAN,

Plaintiff,

vs.

NORVENA E. LINEKER, Formerly NORVENA SVENSEN,

Defendant.

COMPLAINT.

The plaintiff above named complains of the defendant above named and for cause of action alleges:

I.

That on the 22d day of January, 1912, at Modesto, county of Stanislaus, State of California, defendant made, executed and delivered to plaintiff defendant's certain promissory note in the words and figures following, to wit:

"$303.52 Modesto, Cal., Jan. 22, 1912.

On or before one year after date, without grace, for value received, I promise to pay to the order of Mrs. Mary J. Tynan, at Modesto, California, Three Hundred Three and 52/100 Dollars with interest thereon from date until paid at the rate of seven per cent per annum, said interest to be paid annually, [34] and if not paid as it becomes due, to be added to the principal and become a part thereof and bear interest at the same rate; but if default be made in the payment of the interest as above provided, then this note shall become due at the option of the holder thereof; also to pay all legal expenses and attorney's

fees which may be incurred in the collection of this note. All payments which become due by virtue hereof are to be paid in United States Gold Coin.

NORVENA E. SVENSEN."

II.

That by the terms of said promissory note said note is payable at Modesto, County of Stanislaus, State of California.

III.

That said promissory note, or any part thereof, has not been paid and that the same and the whole thereof is now due and unpaid.

IV.

That plaintiff is the lawful owner and holder of said promissory note.

V.

That subsequent to said January 22d, 1912, the said defendant married and that defendant's name is now Norvena E. Lineker.

VI.

That plaintiff has been compelled to employ attorneys for the payment of said promissory note and has thereby incurred attorney's fee; that the sum of one hundred dollars is a reasonable attorney's fee herein.

WHEREFORE, plaintiff prays judgment against said defendant for the sum of $303.52, with interest thereon at the rate of seven per cent per annum from January 22d, 1912, and for the sum of one hundred dollars, attorney's fee herein and for costs of suit.

HATTON & SCOTT,

Attorneys for Plaintiff. [35]

State of California,
County of Stanislaus,—ss.

Mary J. Tynan, being first duly sworn, deposes and says:

That she is the plaintiff in the above-entitled action; that she has heard read the above and foregoing complaint and knows the contents thereof; that the same is true of her own knowledge, except as to the matters therein stated on her information and belief and as to these matters that she believes it to be true.

MARY J. TYNAN.

Subscribed and sworn to before me this 28th day of March, 1913.

[Notarial Seal] T. B. SCOTT,
Notary Public in and for the County of Stanislaus, State of California."

II.

That thereafter on May 11th, 1914, the defendant in said action, to wit, Norvena E. Lineker, formerly Norvena E. Svensen, filed with the clerk of said court her answer and counterclaim in said action, which said answer and counterclaim is in the words and figures following, to wit:

"In the Superior Court of the County of Stanislaus, State of California.

MARY J. TYNAN,

Plaintiff,

vs.

NORVENA E. LINEKER, Formerly NORVENA E. SVENSEN,

Defendant.

Comes now the defendant above named and answering the complaint of the plaintiff on file herein admits, alleges and denies as follows:

I.

Admits that on or about the 22d day of January, [36] 1912, she made, executed and delivered to said plaintiff her promissory note for $303.52, but alleges that said note was given to the said plaintiff merely for the purpose of record of a transaction under and by which the said plaintiff became indebted to the said defendant; and the said defendant alleges that on or about the 28th day of January, 1910, she paid to and on account of the said Mary J. Tynan the sum of $4,000, and that the said amount has not been repaid by the said plaintiff, or any part thereof; and this defendant further alleges that she borrowed said sum of money; as aforesaid, to be paid to and for account of said plaintiff; and gave her promissory note therefor to one Daniel A. McColgan and Robert McColgan, and that the said promissory note sued for in this complaint, or a portion thereof, was on

account of interest paid in advance on account of said McColgan loan.

II.

That the said defendant denies that said note has not been paid, or any part thereof; but on the contrary alleges that it has been paid by reason of said indebtedness and that the said plaintiff is indebted to this defendant over and above the amount of said note.

III.

As to paragraph VI of said complaint this defendant denies that $100 or any amount is a reasonable attorney's fee and denies that any attorney's fee is provided for in said note, or that said plaintiff is entitled to any attorney's fee. And further answering said complaint and by way of counterclaim the said defendant alleges:

I.

That the said plaintiff is indebted to her in the sum of $4,000 for money paid out and advanced to and on account of the said plaintiff within two years prior to the filing of said complaint herein, and said defendant alleges that said amount has not been paid, or any part thereof, but the same [37] is still due, owing and unpaid from the said plaintiff to said defendant.

WHEREFORE, the said defendant prays that the said plaintiff take nothing by her said action and that she have judgment against the said plaintiff for the said sum of $4,000, together with interest thereon at the rate of seven per cent per annum from the 20th

day of June, 1910, and for costs of suit.

L. L. DENNETT,
Attorney for Defendant.

State of California,
County of Alameda,—ss.

Norvena E. Lineker, being duly sworn, deposes and says:

That she is the defendant in the above and foregoing answer; that she has read the same and knows the contents thereof and that the same is true of her own knowledge, except as to those matters therein stated on information and belief, and as to those matters she believes it to be true.

NORVENA E. LINEKER.

Subscribed and sworn to before me this 9th day of May, 1914.

[Notarial Seal] M. D. NICHOLS,
Notary Public in and for the County of Alameda, State of California."

III.

That thereafter on the 24th day of July, 1914, the said action came on regularly for trial upon the complaint of the plaintiff and the answer of the defendant, and Messrs. Hatton & Scott, Esqs., appeared as counsel for the plaintiff, Mary J. Tynan, and L. L. Dennett, Esq., appeared as counsel for the defendant, Norvena E. Lineker, and it was thereupon stipulated [38] in open court in the presence of said Mary J. Tynan and Norvena E. Lineker and by the said Mary J. Tynan and Norvena E. Lineker that judgment be for the plaintiff for the principal amount of said note, together with interest

and costs and that the plaintiff waived attorney's fee, and it was stipulated and agreed in open court by and between the parties that the plaintiff, Mary J. Tynan, was not indebted to the defendant, Norvena E. Lineker, in any sum or amount whatever. Whereupon L. W. Fulkerth, as Judge of said Superior Court, did make and enter Findings of Fact in said cause, which said findings of fact are in the words and figures following, to wit:

"*In the Superior Court of the County of Stanislaus, State of California.*

No. 3910.

MARY J. TYNAN,

Plaintiff,

vs.

NORVENA E. LINEKER, Formerly NORVENA E. SVENSEN,

Defendant.

FINDINGS.

This cause came on regularly for trial on the 24th day of July, 1914, before the Court, Hon. L. W. Fulkerth, Judge presiding. A jury was waived by the parties hereto and the cause came on for trial before the court without a jury. It was stipulated by and between the parties to said cause in open court, that plaintiff have judgment for the amount sued on herein, to wit, the sum of three hundred three and 52/100 ($303.52) dollars, with interest thereon from the 22d day of January, 1912, at the rate of seven per

cent per annum, amounting on the said 24th day of July, 1914, to the sum of three hundred fifty-nine and 84/100 (359.84) dollars and for plaintiff's costs herein. [39]

It was stipulated and agreed that plaintiff is not indebted to defendant in any sum or amount whatever.

Let judgment be entered accordingly.

L. W. FULKERTH,
Judge of the Superior Court.

Dated August 4th, 1914."

IV.

That thereafter and on the 4th day of August, 1914, the Judge of said court duly made and caused to be entered a judgment in said action, which judgment is in the words and figures following, to wit:

"*In the Superior Court of the County of Stanislaus, State of California.*

No. 3910.

MARY J. TYNAN,

Plaintiff,

vs.

NORVENA E. LINEKER, Formerly NORVENA E. SVENSEN,

Defendant.

JUDGMENT BY THE COURT.

This cause came on for trial on the 24th day of July, 1914, Messrs. Hatton & Scott appearing as counsel for plaintiff and L. L. Dennett, Esq., appearing as counsel for the defendant, a trial by jury hav-

ing been waived it was tried before the Court. It was stipulated by and between the parties to said cause, in open court, that plaintiff Mary J. Tynan have judgment against the defendant Norvena W. Lineker, formerly Norvena E. Svensen, for the sum of three hundred fifty-nine and 84/100 (359.84) dollars, and for plaintiff's costs herein, and the court files its findings and decision in writing and orders that judgment be entered herein in favor of plaintiff in accordance with said stipulation.

WHEREFORE, by reason of the law and the stipulation and findings as aforesaid, it is ordered, adjudged and decreed that Mary J. Tynan, the plaintiff, have and recover of and from Norvena E. Lineker, formerly Norvena E. Svensen, the defendant, [40] the sum of three hundred fifty-nine and 84/100 (359.84) dollars, with interest thereon at the rate of seven per cent per annum from the date hereof until paid, together with said plaintiff's costs and disbursements incurred in this action amounting to the sum of (*10*) *dollars.*

Judgment recorded August 4th, 1914.

L. W. FULKERTH,
Judge of the Superior Court.

V.

That said judgment was filed with the clerk of said court on the 4th day of August, 1914, and was thereupon recorded in Judgment Book, Volume 8, page 34, and was docketed on said 4th day of August, 1914, and on said 4th day of August, 1914, said judgment-roll was duly made up, filed and entered and said judgment has not been appealed from, vacated or set

aside and is now in full force and effect, and said judgment has not been paid and no part of said judgment has been paid.

WHEREFORE, defendants pray that they be hence dismissed with their costs of suit.

HAWKINS & HAWKINS,
Attorneys for Defendants.

State of California,
County of Stanislaus,—ss.

Mary J. Dillon, being first duly sworn, deposes and says:

That she is one of the defendants named in the above-entitled action; that she has read the foregoing answer to the complaint and knows the contents thereof and the same is true of her own knowledge, except as to matters therein stated on information and belief and as to such matters she believes it to be true.

MARY J. DILLON.

Subscribed and sworn to before me this 14th day of November, 1918.

[Seal] J. W. HAWKINS,
Notary Public in and for the County of Stanislaus, State of California. [41]

Received copy hereof this second day of December, 1918.

J. L. TAUGHER,
Attorney for Plaintiff.

[Endorsed]: Filed Dec. 3, 1918. W. B. Maling, Clerk. By J. A. Schaertzer, Clerk. [42]

In the Southern Division of the United States District Court, in and for the Northern District of California, Second Division.

No. 16,195.

NORVENA LINEKER and FREDERICK V. LINEKER,

Plaintiffs,

vs.

MARY J. DILLON, etc., and THOMAS B. DILLON,

Defendants.

Verdict.

We, the jury, find in favor of the plaintiffs and assess the damages against the defendants in the sum of 32,000—Thirty-two Thousand and no/100 Dollars.

J. S. ANDREWS,
Foreman.

[Endorsed]: Filed Oct. 3, 1919. Walter B. Maling, Clerk. [43]

In the Southern Division of the United States District Court, in and for the Northern District of California, Second Division.

No. 16,195.

NORVENA LINEKER and FREDERICK V. LINEKER,

Plaintiffs,

vs.

MARY J. DILLON (Formerly MARY J. TYNAN) and THOMAS B. DILLON,

Defendants.

Judgment on Verdict.

This cause having come on regularly for trial upon the 1st day of October, 1919, being a day in the July, 1919, Term of said court, before the Court and a jury of twelve men duly impaneled and sworn to try the issue joined herein; John L. Taugher, Esq., appearing as attorney for plaintiffs, and J. W. Hawkins, Esq., appearing as attorney for defendants; and the trial having been proceeded with on the second and third days of October, all in said year and term, and oral and documentary evidence upon behalf of the respective parties having been introduced and closed and the cause, after arguments by the attorneys and the instructions of the Court, having been submitted to the jury, and the jury having subsequently rendered the following verdict which was ordered recorded, namely: "We, the jury, find in favor of the plaintiffs and assess the damages

against the defendants in the sum of 32,000—Thirty-two thousand and no/100 Dollars. J. S. Andrews, Foreman," and the Court having ordered that judgment be entered in accordance with said verdict and for costs:

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that Norvena Lineker and Frederick V. Lineker, plaintiffs, do have and recover of and from Mary J. Dillon (formerly Mary J. Tynan) and Thomas B. Dillon, defendants, the sum of Thirty-two thousand and no/100 dollars ($32,000.00), together with their costs herein expended taxed at $131.75.

Judgment entered October 3, 1919.

WALTER B. MALING,
Clerk. [44]

A true copy. Attest:
[Seal] WALTER B. MALING,
Clerk.

[Endorsed]: Filed Oct. 3, 1919. W. B. Maling, Clerk. [45]

In the Southern Division of the United States District Court for the Northern District of California.

No. 16,195.

NORVENA LINEKER et al.

vs.

MARY J. DILLON, etc., et al.,

(Clerk's Certificate to Judgment-roll.)

I, Walter B. Maling, clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing papers hereto annexed constitute the Judgment-roll in the above-entitled action.

ATTEST my hand and the seal of said District Court, this 3d day of October, 1919.

[Seal] WALTER B. MALING,
Clerk.
By J. A. Schaertzer,
Deputy Clerk.

[Endorsed]: Filed October 3d, 1919. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [46]

At a stated term, to wit, the November term, A. D. 1920, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the court-room in the City and County of San Francisco, on Monday, the 5th day of January, in the year of our Lord one thousand nine hundred and twenty. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 16,195.

NORVENA LINEKER et al.

vs.

MARY J. DILLON et al.

(Order Modifying Judgment, etc.)

Defendants' petition for a new trial, heretofore submitted, being now fully considered and the Court having rendered its oral opinion, it is ordered that the judgment be modified so that it shall be satisfied out of the separate property of Mary J. Dillon and the community property of Mary J. Dillon and Thomas B. Dillon; and it is further ordered that the petition for a new trial be granted unless the plaintiffs, within ten days, consent to a remission of the sum of $4,000.00 from the amount of the judgment, so that the amount of the judgment be in the sum of $28,000.00, and for costs; to which decision the defendants excepted. And thereupon the plaintiffs in open court, by their attorney, duly consented to the reduction of the judgment herein in the sum of $4,000.00. And such remission having been accepted by the Court it was thereupon ordered that the petition for a new trial be and the same is hereby denied. It is ordered that judgment be entered accordingly as of date of verdict. [47]

In the Southern Division of the United States District Court, in and for the Northern District of California, Second Division.

No. 16,195.

NORVENA LINEKER and FREDERICK V. LINEKER,

Plaintiffs,

vs.

MARY J. DILLON (Formerly MARY J. TYNAN) and THOMAS B. DILLON,

Defendants.

Judgment.

In this cause the defendants having filed a petition for a new trial and after full consideration thereof, the Court having ordered that the judgment be modified so that it shall be satisfied out of the separate property of Mary J. Dillon and the community property of Mary J. Dillon and Thomas B. Dillon and the Court having ordered that the petition for a new trial be granted unless the plaintiffs consent to a remission in the sum of $4,000.00 from the amount of the verdict; and the plaintiffs having consented to such remission; and the Court having thereupon ordered that judgment be entered accordingly as of date October 3, 1919, and for costs:

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that Norvena Lineker and Frederick V. Lineker, plaintiffs, do have and recover of and from

Mary J. Dillon (formerly Mary J. Tynan) and Thomas B. Dillon, defendants, the sum of twenty-eight thousand and no/100 ($28,000.00) dollars, together with their costs herein expended taxed at $———; and that said judgment be satisfied out of the separate property of Mary J. Dillon and the community property of Mary J. Dillon and Thomas B. Dillon.

Judgment entered January 5, 1920, *nunc pro tunc* October 3, 1919.

WALTER B. MALING,
Clerk.

A true copy.

[Seal] Attest: WALTER B. MALING,
Clerk.

[Endorsed]: Filed January 5, 1920, *nunc pro tunc* October 3, 1919. Walter B. Maling, Clerk. [48]

In the Southern Division of the United States District Court for the Northern District of California.

No. 16,195.

NORVENA LINEKER et al.

vs.

MARY J. DILLON, etc., et al.

(Clerk's Certificate to Judgment-roll.)

I, Walter B. Maling, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing papers

hereto annexed constitute the judgment-roll in the above-entitled action.

ATTEST my hand and the seal of said District Court, this 5th day of January, 1920.

[Seal] WALTER B. MALING,
Clerk.

[Endorsed]: Filed January 5, 1920, *nunc pro tunc* October 3, 1919. Walter B. Maling, Clerk. [49]

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

NORVENA LINEKER and FREDERICK V. LINEKER,
Plaintiffs,

vs.

MARY J. DILLON (Formerly MARY J. TYNAN) and THOMAS B. DILLON,
Defendants.

Demurrer.

Come now the defendants above named and demur to the complaint of the plaintiffs on file herein and for grounds of demurrer allege:

I.

That said complaint does not state facts sufficient to constitute a cause of action against the defendants or either of them.

II.

That there is a misjoinder of parties defendant,

to wit, Mary J. Dillon and Thomas B. Dillon, in that it appears from said complaint that Thomas B. Dillon is not a necessary or proper party defendant.

III.

That said complaint is uncertain in that it cannot be ascertained therefrom at what date the defendant, Mary J. Dillon, refused to permit William Winter to have the management or control of the Tynan Hotel in the city of Modesto, Stanislaus County, California, or when the contemplated marriage between the said Norvena Svensen, plaintiff named herein as Norvena Lineker, and William Winter was broken off. Nor can it be ascertained therefrom whether the defendant, Mary J. Dillon, promised and agreed in writing or orally to the effect that if plaintiff, Norvena Lineker, would refrain from instituting or prosecuting any action against her, she the said defendant, Mary J. Dillon, would hold and save the plaintiff, Norvena Lineker, harmless from [50] any loss or damage by reason of the making of the note mentioned in the complaint or the deed of trust. Nor can it be ascertained whether the said Mary J. Dillon in writing promised and agreed that she would cause said debt and interest to be discharged and paid and would procure the deed of trust mentioned in the complaint to be paid and satisfied. Nor can it be ascertained from said complaint whether the defendant Mary J. Dillon in writing or orally promised that she would indemnify and save harmless the said Norvena Lineker from any loss or damage whatsoever in connection with the note and deed of trust mentioned in the complaint.

Nor can it be ascertained when the property mentioned in the complaint and in the deed of trust was sold under the terms of said deed of trust or to whom said property was sold. Nor can it be ascertained from said complaint whether the said Norvena Lineker continued to be the owner of the land described in the complaint up to the date of the alleged sale under the deed of trust. Nor can it be ascertained therefrom what part of the alleged $30,000 damage was incurred by loss of rents and what part thereof consisted of profits from the land described in the complaint. Nor can it be ascertained therefrom what part of the alleged damage of $30,000 was incurred for adjournments of the sale of the property or what part thereof was for attorneys' fees and what part thereof was incurred by said plaintiff in an endeavor to prevent a sale of the property and the loss thereof. Nor can it be ascertained therefrom what part of said damage of $30,000 was incurred by reason of the loss of the land, by reason of the sale under the deed of trust. Nor can it be ascertained what other various proceedings were taken by and on behalf of Daniel A. McColgan which resulted in the plaintiff Norvena Lineker being deprived of the possession of the land and her interest therein. Nor can it be ascertained when Mary J. Dillon agreed to hold and save harmless the plaintiff, Norvena Lineker, from any or all loss or damage by reason of the making of said note and deed of trust. [51]

IV.

That said complaint is unintelligible for the rea-

sons set forth in paragraph III of this demurrer.

V.

That said complaint is ambiguous for the reasons set forth in paragraph III of this demurrer.

VI.

That the cause of action attempted to be set forth in the complaint of plaintiffs is barred by subdivision 1 of section 337 of the Code of Civil Procedure of the State of California.

VII.

That the cause of action set forth in the complaint of plaintiffs is barred by subdivision 1 of section 338 of the Code of Civil Procedure of the State of California.

VIII.

That the cause of action set forth in the complaint of plaintiffs is barred by subdivision 4 of section 338 of the Code of Civil Procedure of the State of California.

IX.

That the cause of action set forth in plaintiffs' complaint is barred by subdivision 1 of section 339 of the Code of Civil Procedure of the State of California.

WHEREFORE, the defendants pray that they be hence dismissed with their costs of suit.

HAWKINS & HAWKINS,
Attorneys for Defendants.

[Endorsed]: Filed Nov. 7, 1918. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [52]

(Docket Entries.)

United States District Court.

Docket 16,195.

Title of Case.

NORVENA LINEKER et al.

vs.

MARY J. DILLON, etc., et al.

Attorneys.

John L. Taugher.

For money under contract of indemnity.

Hawkins & Hawkins—Modesto, Cal.

Date			
Month	Day	Year.	
Oct.	30,	1918.	Filed complaint. Filed praecipe. Issued summons and 2 copies.
Nov.	1,	"	Filed summons.
"	7,	"	Filed demurrer.
"	11,	"	Ord. dem. con. to 18.
"	18,	"	Ord. dem. con. to 25.
Dec.	2,	"	Ord. dem. con. to 9.
"	3,	"	Filed answer.
"	9,	"	Ord. dem. con. to 16.
"	16,	"	Ord. dem. con. to 23.
"	23,	"	Ord. dem. con. to 30.
"	30,	"	Ord. demurrer dropped.

* * * * * * * * *

[53]

In the Southern Division of the United States District Court in and for the Northern District of California, Second Division.

No. 16,195.

NORVENA LINEKER and FREDERICK V. LINEKER,

Plaintiffs,

vs.

MARY J. DILLON (Formerly MARY J. TYNAN) and THOMAS B. DILLON,

Defendants.

Petition for Writ of Error.

To the Honorable WILLIAM C. VAN FLEET, District Judge:

The above-named defendants, Mary J. Dillon, formerly Mary J. Tynan, and Thomas B. Dillon, feeling themselves aggrieved by the judgment in the above-entitled cause made and entered on October 3, 1919, and thereafter modified on motion for a new trial on January 5, 1920, now come by their attorney and petition said Court for an order allowing themselves, the said defendants, and each of them, to prosecute a writ of error to the Honorable the United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided.

And your said petitioners further state that a *supersedeas* is not desired herein, and that they further pray that the proper order relating to the secur-

ity for costs to be required of them be made.

SAMUEL M. SHORTRIDGE,

Attorney for Defendants and Plaintiffs in Error.

[Endorsed]: Filed Feb. 9, 1920. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [54]

In the Southern Division of the United States District Court in and for the Northern District of California, Second Division.

No. 16,195.

NORVENA LINEKER and FREDERICK V. LINEKER,

Plaintiffs,

vs.

MARY J. DILLON (Formerly MARY J. TYNAN) and THOMAS B. DILLON,

Defendants.

Assignment of Errors.

The defendants and plaintiffs in error in the above-entitled action Mary J. Dillon (formerly Mary J. Tynan) and Thomas B. Dillon herewith file in the above-entitled court their petition for a writ of error in the said cause from the judgment therein duly given and made on October 3, 1919, and thereafter modified on motion for a new trial on January 5, 1920, and with said petition file the following assignment of errors upon which they will rely in their prosecution of the said writ of error, to wit:

(1) That the Court erred in assuming jurisdic-

tion of the action in that the amount in controversy herein, exclusive of interest and costs, did not or does not exceed the sum of Three Thousand Dollars ($3,000.00); that the amount in controversy herein, exclusive of interest and costs, does not exceed the sum of Twenty-eight Hundred Dollars ($2,800.00); that therefore the Court erred in assuming jurisdiction of the cause of action or in giving judgment therein for any amount.

(2) That the District Court erred in giving, rendering or entering judgment upon the verdict in the above-entitled cause on the ground that the complaint in said cause did not state [55] facts sufficient to constitute a cause of action.

(3) The said District Court erred in giving or entering judgment in the said cause in the sum of Thirty-two Thousand Dollars ($32,000.00) and costs, or in the sum of Twenty-eight Thousand Dollars ($28,000.00) and costs as modified, on the ground that the complaint in said action does not state facts sufficient to entitle the plaintiffs, or either of them, to judgment in the full amount of said sums, or either of said sums, or in any other sum whatever in excess of Twenty-eight Hundred Dollars ($2800.00).

(4) That the complaint in said action does not state facts sufficient to constitute a cause of action.

(5) That the complaint in said action being upon an alleged breach of contract does not show that plaintiffs, or either of them, suffered any damage from the alleged breach of contract in the sum of Thirty-two Thousand Dollars ($32,000.00) or in the sum of Twenty-eight Thousand Dollars ($28,000.00)

or in any other sum exceeding Twenty-eight Hundred Dollars ($2800.00) or in any sum whatever.

(6) That the complaint in the said action is insufficient nor does it state facts sufficient, to support any judgment in favor of plaintiffs, or either of them, in any amount in excess of Twenty-eight Hundred Dollars ($2800.00) and costs.

(7) That the Court erred in failing to sustain the demurrer to the complaint in the above-entitled action.

(8) That the judgment in the said cause as originally given as well as the judgment in the said cause as modified on January 5, 1920, is wrong and contrary to law in this; that under the said complaint no case was proven or could have been proven sufficient to entitle the plaintiffs, or either of them, to damages in the sum awarded, or in any other sum whatever in excess of Twenty-eight Hundred Dollars ($2800.00). [56]

(9) That the judgment in the said cause as originally given as well as the judgment in the said cause as modified on January 5, 1920, is wrong and contrary to law in this: That it is made payable out of the community property of Thomas B. Dillon, or out of the community property of the defendants; that it is not limited so as to be made payable solely out of the separate property of defendant Mary J. Dillon, and that the Court erred in giving or entering the said judgment so as to be enforcible out of said community property.

WHEREFORE, the said defendants pray that upon these grounds alleged as errors in the action

of the above-entitled court, the said judgment be reversed, and they further pray for such other or further order as may be proper.

SAMUEL M. SHORTRIDGE,
Attorney for Defendants and Plaintiffs in Error.

[Endorsed]: Filed Feb. 9, 1920. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [57]

In the Southern Division of the United States District Court in and for the Northern District of California, Second Division.

No. 16,195.

NORVENA LINEKER and FREDERICK V. LINEKER,

Plaintiffs,

vs.

MARY J. DILLON (Formerly MARY J. TYNAN) and THOMAS B. DILLON,

Defendants.

Order Allowing Writ of Error.

On reading and filing the petition of defendants for a writ of error in the above-entitled cause accompanied by assignments of error, and motion of Samuel M. Shortridge, Esq., attorney for defendants,

IT IS ORDERED, that a writ of error be and is hereby allowed to defendants to have reviewed in the United States Circuit Court of Appeals in and for the Ninth Circuit, the judgment heretofore entered herein against the defendants on October 3,

1919, as modified on motion for a new trial herein on January 5, 1920, and that the amount of the bond for costs on said writ of error be and is hereby fixed at Three Hundred Dollars ($300.00) for the prosecution of said writ.

Dated: February 9th, 1920.

WM. C. VAN FLEET,
District Judge.

[Endorsed]: Filed Feb. 9, 1920. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [58]

FIDELITY AND DEPOSIT COMPANY OF MARYLAND.

The premium charged for this bond is $10.00 per annum.

Pacific Coast Dept. Office. San Francisco, Cal.

Home Office: Baltimore, Md.

In the Southern Division of the United States District Court in and for the Northern District of California, Second Division.

No. 16,195.

NORVENA LINEKER and FREDERICK V. LINEKER,

Plaintiffs,

vs.

MARY J. DILLON (Formerly MARY J. TYNAN) and THOMAS B. DILLON,

Defendants.

Bond on Writ of Error.

WHEREAS, in the above-entitled action in the Southern Division of the United States District Court in and for the Northern District of California, Second Division, a judgment in favor of plaintiffs and against defendants was made and entered on October 3, 1919, and thereafter modified on motion for a new trial on January 5, 1920; and

WHEREAS, the said defendants are dissatisfied with the said judgment as so modified, and have sued out a writ of error to the United States Circuit Court of Appeals, for the Ninth Circuit, to reverse the said judgment.

NOW, THEREFORE, in consideration of the premises and of such writ of error the Fidelity and Deposit Company of Maryland, a corporation having its principal place of business in Baltimore, Maryland, duly incorporated under the laws of the State of Maryland, and authorized to transact business in the State of California, does hereby undertake in the sum of Three Hundred ($300.00) Dollars, and promise on the part of the said defendants to and with said plaintiffs, that said defendants shall prosecute said [59] writ of error to effect and if they fail to make their plea good, shall answer all costs awarded against them, or either of them, upon the said writ of error or a dismissal thereof, not exceeding the aforesaid sum of Three Hundred Dollars ($300.00), to which amount it acknowledges itself bound.

And the said Fidelity and Deposit Company of

Maryland further agrees that in case of a breach of any condition of this instrument, the above-entitled court may upon notice to it of not less than ten days proceed summarily in the said action to ascertain the amount which such surety is bound to pay on account of such breach, and render judgment therefor against it, not exceeding Three Hundred Dollars ($300.00), and award execution therefor.

Dated at San Francisco, California, this 16th day of February, 1920.

[Corporate Seal]

FIDELITY AND DEPOSIT COMPANY OF MARYLAND,

By C. K. BENNETT,
Attorney in Fact.

Attest: PAUL M. NIPPERT,
Agent.

Approved February 17th, 1920. Not to operate as a *supersedeas*.

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed Feb. 17, 1920. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [60]

In the Southern Division of the United States District Court in and for the Northern District of California, Second Division.

No. 16,195.

NORVENA LINEKER and FREDERICK V. LINEKER,

Plaintiffs,

vs.

MARY J. DILLON (Formerly MARY J. TYNAN) and THOMAS B. DILLON,

Defendants.

Praecipe for Transcript of Record.

To the Clerk of the Above-entitled Court:

Sir: Please prepare, annex to and return to the United States Circuit Court of Appeals for the Ninth Circuit with the writ of error heretofore issued in the above-entitled action an authenticated transcript of the following:

The judgment-roll in said action, including therein the complaint, demurrer, answer, verdict, judgment as originally entered on October 3, 1919, and the final judgment as modified on motion for a new trial on January 5, 1920.

The petition for a writ of error therein, and the assignment of errors.

The order allowing the writ of error.

The undertaking on writ of error.

The writ of error and original citation thereon with proof of service thereof.

This praecipe for transcript of record.

SAMUEL M. SHORTRIDGE,
Attorney for Defendants.

Receipt of a copy of the within praecipe for transcript of record is hereby admitted this 17th day of February, 1920.

JOHN L. TAUGHER,
Attorney for Plaintiffs.

[Endorsed]: Filed Feb. 17, 1920. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [61]

In the Southern Division of the United States District Court, for the Northern District of California, Second Division.

No. 16,195.

NORVENA LINEKER et al.,

Plaintiffs,

vs.

MARY J. DILLON (Formerly MARY J. TYNAN), et al.,

Defendants.

Certificate of Clerk U. S. District Court to Transcript of Record.

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify the foregoing pages, numbered from 1 to 61, inclusive, to be full, true and correct copies of the record and proceedings as enumerated in the praecipe for record on writ of error, as the same remain on file and of record in the above-entitled cause, in the office of the clerk of said court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is $27.20; that said amount was paid by the defendants, and that the original writ of error and citation issued in said cause are hereto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 12th day of March, A. D. 1920.

[Seal] WALTER B. MALING,
Clerk United States District Court, for the Northern District of California. [62]

Writ of Error.

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to the Honorable, the Judges of the District Court of the United States for the Northern District of California, GREETING:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between Mary J. Dillon (formerly Mary J. Tynan) and Thomas B. Dillon, plaintiffs in error, and Norvena Lineker and Frederick V. Lineker, defendants in error, a manifest error hath happened, to the great damage of the said Mary J. Dillon (formerly Mary J. Tynan) and Thomas B. Dillon, plaintiffs in error, as by their complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice

done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, the 17th day of February, in the year of our Lord one thousand nine hundred and twenty.

[Seal] WALTER B. MALING,
Clerk of the United States District Court for the Northern District of California.

By J. A. Schaertzer,
Deputy Clerk.

Allowed by

WM. C. VAN FLEET,
District Judge. [63]

Receipt of a copy of the within writ of error is hereby admitted this 17th day of February, 1920.

JOHN L. TAUGHER,
Attorney for Defendants in Error.

(Return to Writ of Error.)

The answer of the Judge of the District Court of the United States, in and for the Northern District of California, Second Division.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

[Seal] WALTER B. MALING,
Clerk United States District Court, Northern District of California.

[Endorsed]: No. 16,195. United States District Court for the Northern District of California. Mary J. Dillon (Formerly Mary J. Tynan) and Thomas B. Dillon, Plaintiffs in Error, vs. Norvena Lineker and Frederick V. Lineker, Defendants in Error. Writ of Error. Filed Feb. 17, 1920. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

Citation on Writ of Error.

UNITED STATES OF AMERICA,—ss.

The President of the United States, to Norvena Lineker and Frederick V. Lineker, Defendants in Error, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals

for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error duly issued and now on file in the clerk's office of the United States District Court for the Northern District of California, wherein Mary J. Dillon (formerly Mary J. Tynan) and Thomas B. Dillon are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WILLIAM C. VAN FLEET, United States District Judge for the Northern District of California, this 17th day of February, A. D. 1920.

WM. C. VAN FLEET,
United States District Judge. [64]

Receipt of a copy of the within citation on writ of error is hereby admitted this 17th day of February, 1920.

JOHN L. TAUGHER,
Attorney for Defendants in Error.

[Endorsed]: No. 16,195. United States District Court for the Northern District of California. Mary J. Dillon (formerly Mary J. Tynan) and Thomas B. Dillon, Plaintiffs in Error, vs. Norvena Lineker and Frederick V. Lineker, Defendants in Error. Citation on Writ of Error. Filed Feb. 17, 1920. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

[Endorsed]: No. 3465. United States Circuit Court of Appeals for the Ninth Circuit. Mary J. Dillon (Formerly Mary J. Tynan) and Thomas B. Dillon, Plaintiffs in Error, vs. Norvena Lineker and Frederick V. Lineker, Defendants in Error. Transcript of Record. Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division.

Filed March 13, 1920.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

No. 3465

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MARY J. DILLON (formerly Mary J. Tynan) and THOMAS B. DILLON,
Plaintiffs in Error,

vs.

NORVENA LINEKER and FREDERICK V. LINEKER,
Defendants in Error.

BRIEF FOR PLAINTIFFS IN ERROR.

SAMUEL M. SHORTRIDGE,
Attorney for Plaintiffs in Error.

PERNAU-WALSH PRINTING CO.

No. 3465

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MARY J. DILLON (formerly Mary J. Tynan) and THOMAS B. DILLON,
Plaintiffs in Error,

vs.

NORVENA LINEKER and FREDERICK V. LINEKER,
Defendants in Error.

BRIEF FOR PLAINTIFFS IN ERROR.

I.

Statement.

Mary J. Dillon and Thomas B. Dillon, her husband, prosecute this writ of error to obtain the reversal of a judgment of the District Court for the Northern District of California against them and in favor of Norvena Lineker and Frederick V. Lineker, defendants in error.

The cause was tried by a jury, who returned a verdict against the plaintiffs in error in the sum of $32,000.00 on October 3, 1919; judgment was thereupon entered according to the verdict.

A petition for a new trial was presented by plaintiffs in error and such proceedings were had, that on January 5, 1920, the judgment was modified by reducing it to $28,000.00, and providing that it should be satisfied out of the separate property of the said Mary J. Dillon and the community property of herself and husband. Judgment as so modified was thereupon entered on January 5, 1920.

The case of plaintiffs in error is here presented on the technical "record", without a bill of exceptions, and the assignments of error urged by them are such as appear upon the face of the complaint.

The complaint contains 22 paragraphs. The paragraphs relating to the citizenship and coverture of the parties, present no questions and need not be considered. Certain other paragraphs, i. e., V, VI, VII, X, XI, XIV, XV, XVII and various portions of the remaining paragraphs, relate to matters clearly surplusage in this action at law.

Giving attention to the matters of substance alleged in the complaint, it appears:

That on June 20, 1910, the said Mary J. Dillon was a single woman (then named Mary J. Tynan), and the said Norvena Lineker was a single woman (then named Norvena Svensen). On that date, at the request of the said Mary J. Dillon's son, one William Winter, the said Norvena Lineker borrowed from one Daniel A. McColgan the sum of $2850.00, executed to him her promissory note in said sum and to secure the payment thereof, gave him a trust deed

whereby she conveyed to a trustee for him all her interest in certain real property (Par. XIII, Tr. pp. 6, 7). This real property was in the County of Stanislaus, alleged to be then of the value of $35,000.00, and it appeared that the said Norvena Svensen owned an estate therein, that is to say, the estate remaining after the termination of the life estate in favor of one Ole Svensen, the father of Norvena Svensen, which said life estate did not fall in until the death of said Ole Svensen on August 6, 1916.

That on June 20, 1910, the said Norvena Svensen received $2850.00 in cash from said Daniel A. McColgan, and immediately turned over the said sum to the said William Winter for the use and benefit of Mary J. Dillon, who applied same for her own use in making repairs on her certain real property (Par. XVI, Tr. p. 8).

That on April 22, 1911, the said Daniel A. McColgan demanded of the said Norvena Svensen payment of the said promissory note and told her that if she failed to pay, he would cause her interest in said property to be sold. Thereupon the said Norvena Svensen went to defendant, Mary J. Dillon,

> "and demanded of her that she immediately pay and satisfy said note and interest, and procure the satisfaction and cancellation of said trust deed; and she, the said plaintiff, then and there told said defendant that if she failed to pay and satisfy said note forthwith and cause said trust deed to be satisfied and discharged, she, the said plaintiff, would immediately bring action

against the said defendant, Mary J. Dillon (then Mary J. Tynan) and her son William Winter to recover the amount of said note".

(Par. XVIII, Tr. p. 8.)

Thereupon said Mary J. Dillon requested the said Norvena Svensen not to prosecute any action against her or her son to recover said money borrowed on said note from Daniel A. McColgan and secured by said trust deed; and the said defendant, Mary J. Dillon, then and there agreed with the said Norvena Svensen that if she would refrain from prosecuting any action against her or William Winter, she, the said Mary J. Dillon, would save the said Norvena Svensen

"harmless from any and all loss or damage by reason of the making of said note or said trust deed; and that she, the said defendant Mary J. Dillon, would cause said debt and interest to be paid and discharged and would procure said trust deed to be paid and satisfied, and she, the said defendant Mary J. Dillon, would indemnify and save harmless the said Norvena Lineker (then Norvena Svensen) from any loss or damage whatsoever in connection with said note and trust deed".

(Par. XIX, Tr. p. 9.)

That relying on said promise, the said Norvena Svensen refrained from commencing or bringing or prosecuting any action to recover said money from either Mary J. Dillon or William Winter (Par. XX, Tr. p. 10).

"That thereafter the said Daniel A. McColgan took various proceedings under the said

trust deed, for the purpose of obtaining the money secured thereby, and large expense was incurred in connection therewith; that several adjournments of the sale of said property, under said trust deed, were had from time to time, and further expense thereby incurred; and further expense for attorney's fees, and the like, were incurred by said plaintiff in an endeavor to prevent a sale of said property and a loss thereof to said plaintiff; that thereafter the said Daniel A. McColgan caused said property to be sold under said trust deed, and various other proceedings were had and taken by and on behalf of the said Daniel A. McColgan which resulted in this plaintiff, Norvena Lineker, being deprived of possession of said land and of her interest therein. and of the rents, issues and profits thereof, to her loss and damage in the sum of $35,000.00."

(Par. XXI, Tr. p. 10.)

It is further alleged that defendant, Mary J. Dillon failed and neglected to pay off said indebedness incurred for her use and benefit, and failed and neglected to pay off said note or the interest thereon, or to pay or satisfy the said trust deed, and has failed to hold or save plaintiff harmless from any loss caused to or incurred by plaintiff in connection with the said note and trust deed to her loss and damage in the sum of $35,000.00.

(Par. XXII, Tr. p. 11.)

II.

Specifications of Error Relied Upon.

(Pages 67-70.)

The assignment of errors filed by plaintiffs in error at the time the writ was granted, has been printed in the transcript and appears at length at pages 67 to 70. It is too long to be quoted here; certain propositions are stated in different forms, but they substantially amount to the following propositions which are now urged upon this Court:

(1) The complaint failed to state any facts that would afford any support for any verdict or judgment in the amount rendered, or in any amount in excess of $2850.00 and interest;

(2) The proposition last referred to being established, it results that the Court did not have jurisdiction of the subject matter of the action, for the reason that the amount in controversy exclusive of interest did not exceed the sum of $3000.00; although the complaint contains a positive averment in that behalf, nevertheless, the real facts being stated, it is submitted that the averment must be rejected as surplusage;

(3) The complaint failed to state any cause of action sufficient to justify any judgment against the plaintiff in error, Thomas B. Dillon;

(4) The complaint failed to state any cause of action against any one.

III.

Argument.

1. THE CONTRACT OF MRS. DILLON WAS TO PAY THE McCOLGAN DEBT, WHICH AMOUNTED TO $2850.00 AND INTEREST.

The contract of Mrs. Dillon was not in strictness mere indemnity. It was a positive contract to pay a given debt. The substantial outstanding obligation of Miss Svenson was her note to McColgan for a particular sum of money and interest. The instrument given by her as security was a mere incident. She claimed that money raised by her had been loaned to Mrs. Dillon through her agent. She desired that the transaction be taken care of and she went to Mrs. Dillon with the demand that the *debt* be paid. She did not take a mere indemnity engagement. She desired and obtained more, to wit: the positive agreement of Mrs. Dillon to pay. Had she accepted mere indemnity, she would have been obliged first to pay the debt herself before she could recover it; she could not bring her action until she had paid it, and in her action she would of necessity allege and prove damages. In such an action the defendant's plea at common law would have been *non damnificatus;* defendant would not be under the burden of pleading and showing performance of his contract.

Port v. Jackson, 17 Johns. 239 and 479, in Err.

But being well advised, Miss Svenson exacted the greater obligation; she obtained the definite promise of Mrs. Dillon to pay the debt. Thereupon Miss Svenson obtained a greater advantage; she could have sued Mrs. Dillon to recover the debt without having paid it, she would not be under the obligation of pleading or proving damages. In such case, at common law, the defendant could not plead *non damnificatus,* but was under the burden of pleading and showing performance, to wit: of showing that he paid the debt as agreed.

Port v. Jackson, supra.

If it be said that the contract of Mrs. Dillon here contains promises of different character, the result is, that we must resort to the intention of the parties, to construe the agreement; and from such it is clear that the intention was to contract to pay the debt rather than mere indemnity.

In the Matter of Negus, 7 Wend. 499, 504.

In that case, the Court quoted from the case of Jackson v. Port, supra, and continued its own comment in the following excerpt:

> "The distinction taken by Chancellor Kent, in Jackson v. Port, in Err., 17 Johns. 482, is this:
>
> 'Where a defendant has undertaken to do an act in discharge of the plaintiff from such a bond or covenant, he must show, specially, matter of performance; and this, Jackson ought to have shown in this case; but where the defendant has undertaken to acquit and discharge the plaintiff from any damages, by reason of his

> bond or covenant, he then merely undertakes to indemnify and save harmless, and the plaintiff is then bound to show his damages.' It must be observed that the learned judge speaks of bonds drawn in those different modes, but here the bond contains both modes of expression; the ultimate object of both is indemnification to the plaintiff. Where indemnity alone is expressed, it has always been held that damage must be sustained before a recovery can be had; but where there is a positive agreement to do the act which is to prevent damage to the plaintiff, then an action lies, if the defendant neglects or refuses to do such act; and where the covenant is both to do the act and to indemnify, we must *resort* to the *intention* of the *parties.*''

If we apply the test indicated, in order to construe the contract pleaded here, it is clear that it was the intention of the parties to enter into the greater obligation and not into a mere covenant to indemnify. Thus Mrs. Dillon's obligation was to pay a definite debt; all other promises, if any, were mere incidents of her principal obligation. Any lesser promises would be merged in the greater; the greater covenant would give character to the whole agreement. The McColgan note and trust deed was a single and inseparable obligation. It could not be breached and sued upon in piecemeal. So the agreement of Mrs. Dillon to pay and satisfy the McColgan note and trust deed was a single, inseparable covenant, which if broken once was broken wholly. It could not have been sued upon in piecemeal. Accordingly, when Mrs. Dillon failed to pay the

debt, she breached her contract for all purposes; the measure of damages then became fixed in the amount of the debt. And any damages for the breach of anything promised by her other than her promise to pay her debt, would be merely nominal.

Mrs. Dillon's obligation was to pay the McColgan debt, neither more or less.

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2. MRS. DILLON'S OBLIGATION, IF ANY, WAS TO PAY THE McCOLGAN DEBT WHEN DUE, OR FORTHWITH IN CASE IT WAS ALREADY DUE.

According to the averments of the complaint, no time was specified within which Mrs. Dillon should pay the McColgan note. In the absence of such specification, her agreement may be considered to have been, to pay the McColgan note when due. But there is no averment as to *when* the note became due. For ought that appears it may not have matured up to the time of commencing this action. But assuming, in the absence of averment, that the McColgan debt was due in April, 1911, then Mrs. Dillon's promise, if any, was to pay within a reasonable time, which, under the circumstances would have been forthwith.

The breach of her contract, if any, would have been at that time, and damages estimated under the proper measure of damages, would have become fixed at that time.

Furnas v. Durgin, 119 Mass. 500; 20 Am. Rep. 341.

3. THE MEASURE OF DAMAGES FOR MRS. DILLON'S ALLEGED BREACH OF HER PROMISE, WAS THE AMOUNT OF THE McCOLGAN DEBT, TO WIT: $2850.00 AND INTEREST.

The averments of paragraph XIII of the complaint, shows that on June 20, 1910, Miss Svenson borrowed from Daniel A. McColgan the sum of $2850.00 and executed to him her promissory note in that sum. The amount of interest, if any, is not stated, but if there be any presumption, it would be that the interest was to be annual interest at the rate of 7 per cent per annum. There is nothing in the complaint affording any basis for any claim for there being any other covenant, promise, obligation or agreement, from Svenson to McColgan, than the meager statement in paragraph XIII.

Therefore, it must be taken as conclusive, that it was within the contemplation of the parties that the amount of Mrs. Dillon's obligation, if any, assumed on April 22, 1911, was to pay to McColgan $2850.00, and interest at 7 per cent per annum from June 20, 1910. Such sum constitutes the measure of damages, reasonably or proximately resulting from any breach of the obligation on Mrs. Dillon. Breach of an obligation to pay a mortgage debt, is the amount of the debt.

Turner v. Howze, 28 Cal. App. 167;
Stokes v. Robertson, 85 S. E. 895 (Ga.);
Lathrop v. Atwood, 21 Conn. 117;
Gage v. Lewis, 68 Ill. 604;
Lowe v. Turpie, 44 N. E. 25; 157 Ind. 652;
Furnas v. Durgin, 119 Mass. 500.

4. MISS SVENSEN COULD NOT HAVE RECOVERED A GREATER AMOUNT OF DAMAGES FOR THE BREACH THAN SHE COULD HAVE GAINED BY FULL PERFORMANCE.

Section 3358 Civil Code of Cal.;

Palm v. Planada Dev. Corp., 175 Cal. 771, 773;

Johnson v. Hinkel, 29 Cal. App. 78, 84;

Bates v. Diamond Crystal Salt Co., 55 N. W. 258 (Neb.);

Hickok v. W. E. Adams Co., 99 N. W. 77 (S. D.).

Had the alleged agreement been fully carried out, Mrs. Dillon would have been called upon to pay $2850 and interest, and no more. That was the full amount in money that would have been gained by Miss Svenson upon full performance, if performed according to the contemplation of parties. Yet it is sought now, following a breach of the agreement, to mulct Mrs. Dillon in damages six times as much as she would have been compelled to pay by performance. Plainly, it has been exceedingly advantageous for Miss Svenson to have the contract breached.

The statutory rules of damages set forth in the various sections of the Civil Code are to be deemed limited and circumscribed by the particular provision contained in Section 3358.

Palm v. Planada Dev. Corp., supra.

5. THE MEASURE OF DAMAGES FOR DELAY IN PERFORMANCE IS LIMITED TO INTEREST ON THE MONEY WHICH SHOULD HAVE BEEN PAID.

The measure of damages for which Mrs. Dillon became liable by the breach of her promise to pay the McColgan note, being shown to be the amount of the note with interest, that sum became fixed as early as 1911. The sum so fixed cannot be deemed to have become enhanced by circumstances happening thereafter, such as loss of property by forced sale, inability to undertake other enterprises, inability to carry out other contracts, or anything of that nature. The damages incurred by delay in paying the note is conclusively deemed to be interest on the amount of the note.

Loudon v. Taxing Dist. etc., 104 U. S. 771;
New Orleans Ins. Ass'n. v. Piaggio, 83 U. S. (16 Wall.) 378; 21 L. ed. 358;
Savings Bank of S. Cal. v. Asbury, 117 Cal. 96;
Guy v. Franklin, 5 Cal. 416.

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6. THE MEASURE OF DAMAGES FOR THE BREACH OF AN AGREEMENT TO PAY, DISCHARGE, REMOVE, INDEMNIFY OR SAVE HARMLESS FROM A LIEN UPON REAL ESTATE, IS THE AMOUNT OF THE LIEN AND NOT THE VALUE OF THE REAL ESTATE.

As alleged in the complaint, the promise of Mrs. Dillon in respect of the McColgan debt was stated in various phrases. In connection with the note

and debt, certain references were made to a trust deed which Mrs. Dillon was to satisfy, to indemnify or to save harmless, etc. But the case is not altered from a consideration of these incidental features of the promise alleged, for the reason that no damages could proximately result to Miss Svensen over and above the amount of the McColgan debt.

As we have shown in our argument in Section I, above, the intention of the parties is deemed to govern in construing the contract, and that the transaction so construed amounts, in sum, to the promise of Mrs. Dillon to pay the McColgan debt. The measure of damages for a breach of a promise of that character is, as we have shown, the amount of the debt. The damages to proximately result from a breach could have no essential relation to the value of the encumbered real estate; they would be fixed with reference to the amount of the debt to be paid.

If the case was that the promise was not to pay the debt, but to "indemnify" or "save harmless" from the encumbrance, or in other words, if the promise was unmixed *indemnity* rather than of *payment,* still the measure of damages for the breach would be referred rather to the amount of the encumbrance than to the value of the encumbered real estate. In other words, the measure of damages for failure to remove an encumbrance or for a breach of a covenant against an encumbrance, would be the amount of the encumbrance and not the value of the encumbered estate which may have

been sold, unless the value of the estate be less than the encumbrance, in which event such value would measure the damages.

This has been so ruled in the well considered Massachusetts case of

Furnas v. Durgin, 119 Mass. 500,

wherein the Court said:

> "It has been held, however, in favor of the covenantor, that when the mortgage is less than the value of the land, and it would be plainly for the interest of the holder of the equity of redemption to redeem, the covenantee on such eviction shall recover only the amount of the mortgage, with interest, and not the full value of the estate."

In the case of

White v. Whitney, 3 Metc. (44 Mass.) 86, 89,

the Court held:

> "Where land, that is subject to a mortgage, is conveyed with a covenant of warranty, and the grantee is ousted by the mortgagee, the rule of damages, upon a suit on the covenant, is the value of the estate at the time of the ouster, unless that value exceeds the amount due on the mortgage; but if it exceed that amount, then that amount is the measure of damages."

When an agreement is made to indemnify against, or to advance money to remove, an encumbrance upon real estate, the measure of damages for the breach cannot exceed the encumbrance. It may be less than the lien in the event that the value of the real estate sold thereunder is less than the lien but it cannot be greater. Any loss to the land owner

which represents the excess in value of the land sold over the amount of encumbrance, is not the proximate result of the breach of the agreement.

This principle has been established in the following well considered cases:

Lowe v. Turpie, 44 N. E. 25; 147 Ind. 652; 37 L. R. A. 233;
White v.Whitney, 3 Metc. (44 Mass.) 86, 89;
Tufts v. Adams, 8 Pick. (24 Mass.) 547;
Blood v. Wilkins, 43 Iowa 567;
Furnas v. Durgin, 119 Mass. 500.

The case of Lowe v. Turpie, supra, is a very instructive case, in which the Supreme Court of Indiana, in reversing the decision of the lower Court, applied the rule of damages herein contended for. It appeared that for a consideration, Lowe had contracted to advance money to remove certain liens from real estate owned by the Turpies; that the Turpies were to reimburse Lowe for a portion but not all of the moneys so advanced. The real estate was conveyed to Lowe as security. He failed to take care of the liens whereupon the land was sold to satisfy the liens, and thereby lost to the Turpies. They sought damages for a breach of the contract to advance money to remove the liens, and claimed the value of the land so lost which the lower Court saw fit to allow. This the Supreme Court held to be the application of an erroneous measure of damages; that nothing more than nominal damages could have accrued to the Turpies for the breach of Lowe's contract.

In the course of its opinion, the Court said:

"It is clear, we think, that the measure of damages for the breach by appellant of his agreement to advance money to pay liens, etc., set forth in the finding, is the same as for breach of a contract to loan money direct. This Court also held in that case that the complaint, so far as it rested upon the agreement of this appellant to advance money, and the deeds to secure the same, only made a case for nominal damages, as no special damages were shown." * * *

"It is the rule, settled beyond controversy, that the damages to be recovered must be the natural and proximate consequences of the breach of the contract. Damages which are remote or speculative cannot be recovered." * * *

"When one is indebted to another, and fails to pay the same when due, the damages for the delay in payment are provided for in the allowance of interest. This is the measure of damages adopted by the law in all actions by the creditor against his debtor." * * *

"Appellees admit the measure of damages for the failure of a debtor to pay money when due to be as stated, but insist that when the obligation to pay money is special, and has reference to other objects than the mere discharge of debts,—as in this case, to advance or loan money to pay taxes and discharge liens,—damages beyond interest for delay of payment, according to the actual injury, may be recovered; citing 1 Sutherland, Damages, p. 164, sec. 77, where the rule stated by appellees is approved. The author, however, in the same section, says: 'Where one person furnishes money to another to discharge an encumbrance upon the land of the person furnishing the money, and the person undertaking to dis-

charge the encumbrance neglects to do it, and the land is lost to the owner by reason of the encumbrance, the measure of damages may be the money furnished, with the interest, or the value of the land lost, according to circumstances. If the landowner has knowledge of the agent's failure in *time* to *redeem* the *land himself,* his damages will be the *money furnished with interest.* But if the landowner justly relies upon his agent to whom he has furnished money to discharge the encumbrance, and the land is lost without his knowledge and solely through the fault of the agent, the latter will be liable for the value of the land at the time it was lost.' * * *

"We think the rule concerning the measure of damages in cases where one person furnishes the money to another to discharge liens on the land of the one furnishing the money is correctly stated in Blood v. Wilkins, 43 Iowa 567. In an action for breach of a contract to loan money to pay liens or encumbrances, no more than nominal damages can be recovered unless the facts showing special damages are alleged and proved." * * *

"*In contemplation of law, money is always in the market, and procurable at the lawful rate of interest.* And if the owner of real estate, who has a contract with another to loan him money to pay liens or encumbrances on his land, who refuses to do so, had knowledge of such refusal in time to give him an opportunity to seek for it elsewhere, the fact that he cannot procure the money, on account of being in embarrassed circumstances, will *not entitle him to recover more than nominal damages;* for the reason that no party's conditions, in respect to the measure of damages, is any worse, for having failed in his engagement to a person whose affairs are embarrassed, than if the same result

had occurred with one in prosperous or affluent circumstances." (Citing cases.) * * *

"In Mayhew v. Burns, 103 Ind. 338, 342, this Court, by Mitchell, J., said:

" 'The law does not set up one standard by which to determine the rights or measure the conduct of the rich, and another for the poor. Its protecting shield is extended alike over all. Its pride and glory are to mete out equal and exact justice to all, in the same scale, rich and poor alike. In this all find security and protection.' It follows, therefore, that upon the facts found the Turpies were not entitled to more than nominal damages for the breach by appellant of his contract to loan money to pay liens and encumbrances."

In the case of Blood v. Wilkins, supra, the same rule of damages was applied. There a landowner had deposited money with an agent to discharge encumbrances on his land. The agent failed to do so and the land was lost by reason of an encumbrance. And it was said:

"If the landowner has knowledge of the agent's failure in *time* to *redeem* the *land himself,* his damages will be the *money furnished with interest.* But if the landowner justly relies upon his agent to whom he has furnished money to discharge the encumbrance and the land is lost without his knowledge and solely through the fault of the agent, then the latter will be liable for the value of the land at the time it is lost."

Here the complaint contains no allegation of any special duty resting upon Mrs. Dillon by virtue of her being an agent or trustee of Svensen. It con-

tains no allegation that Svensen was surprised or did not have ample time to obtain the money elsewhere upon the security of her real estate. It contains no suggestion of any fact tending to show why it was necessary to allow property worth ten times the value, to be sacrificed for a mere $2850.00 debt. In no just sense can a larger loss be said proximately to result from the failure of Mrs. Dillon to pay the $2850.00; nor can it be justly said that it was within the contemplation of the parties that Mrs. Dillon would become liable for such a large amount of damages for her failure to pay the note or for any sum in excess of the note and interest.

Any alleged damage claimed to flow from the breach of Mrs. Dillon's contract, outside of her failure to pay the McColgan debt, cannot be more than nominal.

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7. THE COMPLAINT DOES NOT SHOW SPECIAL DAMAGES.

If it be taken that the complaint shows that Svensen suffered damages in the amount of the McColgan debt, it is quite clear that it does not show any item of special damages. It does not show the amount of any alleged expenses paid, or of any counsel fees, or of any cost of publication.

The complaint is quite meager in its references to the trust deed or as to what was done thereunder; it does not incorporate a copy of the alleged trust

deed; it does not set forth any of its terms or provisions. It merely contains the bare statement that, "to secure the payment thereof" (the McColgan note), Svensen executed "a trust deed whereby she conveyed all her interest in said real property to one R. McColgan as trustee for the said D. A. McColgan". No other provision of the trust deed was pleaded. It does not appear that any provision was made for expenses or counsel fees.

Any estate in Svensen other than what would be necessary to the execution of the trust, was left in her (Sec. 866 C. C.). Therefore, if the property was sold at its value—and it is not alleged that it was not—the surplus over the McColgan debt would be paid to her. The amount for which the real property was sold is not alleged.

The value of Svensen's estate in the real property does not appear. It is alleged the real estate was worth $35,000.00, but Svensen had only a remainder therein after the termination of a life estate; the value of her estate is not stated.

If we were to assume that Mrs. Dillon would be responsible for the act of McColgan in causing the property to be sold under the trust deed, there is no warrant for charging her with a responsibility for other proceedings taken by McColgan, which may have resulted in loss to Svensen. When regard is had to the allegation of the complaint, it appears that "thereafter" McColgan caused the said property to be sold under the trust deed. But the

further allegation that "various other proceedings were had and taken by" McColgan which resulted in plaintiff's loss, adds nothing to the complaint. As to the latter proceedings it is sufficient to point out that Mrs. Dillon was not responsible for them. It is not shown what they were; they are not shown to have been under the terms of the trust deed; it is not shown that they had any relation to the trust deed. In no event would responsibility for alleged damage from such "other proceedings" be embraced within Mrs. Dillon's promise.

Mrs. Dillon is not responsible for McColgan's acts, which have no relation to the trust deed and may even have been wrongful.

Vicars v. Wilcocks, 8 East 1; 103 Reprint 245;

State v. Ward, 9 Heisk. 100 (Tenn.);

Nirdlinger v. American Dist. Tel. Co., 245 Pa. 453; 91 A. 883;

Cuff v. Newark, etc., R. Co., 35 N. J. L. 17; 10 Am. R. 205;

Shugart v. Egan, 83 Ill. 56; 25 Am. R. 359.

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8. IT THUS APPEARS FROM THE RECORD THAT APPLYING THE LEGAL RULE OF DAMAGES FLOWING FROM THE FACTS PLEADED, THE VERDICT AND JUDGMENT ARE EXCESSIVE TO A LARGE AMOUNT, AND PLAINTIFFS IN ERROR ARE ENTITLED TO BE RELIEVED FROM THE JUDGMENT AWARDING SUCH EXCESS.

We have shown, that if all the facts alleged in the complaint were true, the total amount of damages

that could accrue would be the amount of the McColgan debt and interest. Therefore, the judgment and verdict are in excess to a large amount. These facts appear from the record. The plaintiffs in error are entitled on this writ of error to have relief from such excessive verdict and judgment.

New Orleans Ins. Ass'n. v. Piaggio, 83 U. S. 378; 21 L. ed. 358;

World's Columbian Exposition v. Republic, 91 Fed. 64, 76;

Vance v. W. A. Vandercook Co., 170 U. S. 468; 42 L. ed. 1111.

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9. SUCH BEING THE TRUE MEASURE OF DAMAGES IN THE CASE AT BAR, IT RESULTS THAT THE DISTRICT COURT DID NOT HAVE JURISDICTION.

From the facts stated in the complaint, it follows as a matter of law, that the true measure of damages was the amount of the McColgan debt, to wit: $2850.00 and interest. It is thus shown that the real amount in controversy was less than $3000.00, exclusive of interest and costs. Accordingly, the true amount in controversy was not sufficient to confer jurisdiction upon a Federal Court. It is true that the plaintiff in the original action claimed more than $3000.00; and it is also true that the complaint contains the general averment that the amount in controversy exclusive of interest exceeds $3000.00. But it has been held that when upon the face of plain-

tiffs own pleadings it is not legally possible for him to recover the jurisdictional amount, a Federal Court has not jurisdiction, regardless of the amount for which the plaintiff prays judgment.

Vance v. W. A. Vandercook Co., 170 U. S. 468; 42 L. ed. 1111.

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10. IN NO EVENT IS PLAINTIFF IN ERROR, THOMAS B. DILLON, LIABLE ON THE AGREEMENT BETWEEN MRS. DILLON AND SVENSEN; JUDGMENT SHOULD NOT RUN AGAINST HIM.

It is unquestioned that the agreement herein sued upon was made, if at all, by Mrs. Dillon alone several years prior to her marriage with Thomas B. Dillon. He had nothing whatever to do with the contract, yet the judgment runs against him for the amount of $28,000.00, in the same way as it does against Mrs. Dillon. Such a *liability* is *against* him *personally*. It is true that on motion for a new trial it was modified so as not to affect his separate property. But this affords little practical relief. He still remains *bound personally,* although he had nothing whatever to do with the contract sued upon. The judgment, if otherwise proper, should be enforcible solely out of any separate property belonging to Mrs. Dillon.

Blessing v. Feder, 28 Cal. App. Dec. 754 (hearing by Supreme Court denied May 26, 1919);

Bogart v. Woodruff, 96 Cal. 609, 612.

II. THE COMPLAINT FAILS TO STATE A CAUSE OF ACTION AGAINST ANY ONE IN ANY AMOUNT.

(a) It was incumbent upon the pleader to state the consideration for the promise.

Acheson v. Western U. Tel. Co., 96 Cal. 641, 644.

(b) The complaint fails to show any legal or valid consideration for Mrs. Dillon's alleged promise; it fails to allege that Svensen promised or agreed to anything; or promised or agreed to refrain from bringing the threatened action against Mrs. Dillon; no agreement on the part of Svensen not to sue was alleged. Mere forbearance to sue does not constitute a good consideration.

Shadburne v. Daly, 76 Cal. 355;
Estate of Thomson, 165 Cal. 290;
Blumenthal v. Tibbits, 66 N. E. 159 (160 Ind. 70);
Williams v. Hasshagen, 166 Cal. 386, 390.

CONCLUSION.

As we have shown above, sufficient facts appear from the record to show that a manifest injustice has been done to Mrs. Dillon in this case. Reading the meager allegations of the complaint, sufficient appears to shock the moral sense of any impartial man when the result is considered. We see the entire fortune of Mrs. Dillon in the sum of $28,000.00 taken from her in October, 1919, upon an alleged

promise, resting in mere parol, to pay a given debt of $2850.00, which promise is said to have been made eight years before. An Appellate Court knowing how business is ordinarily conducted, and skilled in the application of law to fact may well be puzzled from the meager averments of the complaint as to how such a result should have followed the initial transaction.

There is no bill of exceptions in the record which the Court might read to learn what transpired at the trial. Owing to the not unpardonable belief of former counsel for plaintiffs in error that the state practice governed in that behalf, no exceptions were taken on questions of law as to evidence raised at the trial. But a study of the record has convinced us that sufficient evidence appears from the record before this Court to enable justice to be done.

The judgment should be reversed.

Dated, San Francisco,
May 5, 1920.

Respectfully submitted,

SAMUEL M. SHORTRIDGE,
Attorney for Plaintiffs in Error.

No. 3465

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MARY J. DILLON (formerly Mary J. Tynan) and THOMAS B. DILLON,
Plaintiffs in Error,

vs.

NORVENA LINEKER and FREDERICK V. LINEKER,
Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR.

JOHN L. TAUGHER,
Attorney for Defendants in Error.

PERNAU-WALSH PRINTING CO.

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vs.

NORVENA LINEKER and FREDERICK V. LINEKER,
Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR.

Statement of the Case.

This was an action brought by Norvena Lineker and Frederick V. Lineker, plaintiffs in the court below, who are citizens of the Dominion of Canada, to recover the damages suffered by them by reason of the breach by defendants in the court below, of a certain contract of indemnity whereby the defendant Mary J. Dillon agreed to save the plaintiff Norvena Lineker harmless from any and all loss or damage under or by reason of a certain trust deed made by the said plaintiff Norvena Lineker to one Daniel A. McColgan by means of which the said Norvena Lineker (then Norvena Svensen) trans-

ferred to R. McColgan as trustee for his brother, Daniel A. McColgan, certain valuable land in Stanislaus County, State of California, as in said deed described, to secure the repayment of $2850.00 then loaned and the interest that would accrue thereon *and also to secure* all future advances that might be made on the property therein described with interest thereon *and also to secure* all costs and liens that might be thereafter unpaid upon such lands *and also to secure* all expenses that might be incurred by said R. McColgan and Daniel A. McColgan in connection therewith.

Under and by means of such deed of trust the plaintiff Norvena Lineker borrowed certain moneys from Daniel A. McColgan for the use and benefit of the defendant Mary J. Dillon (then Mary J. Tynan) and her son William Winter and such money *together with other moneys subsequently borrowed under said trust deed as shown by the evidence introduced at the trial* had been turned over by the plaintiff Norvena Lineker to William Winter to be expended in repairing and furnishing a certain hotel and hotel building owned by the defendant Mary J. Dillon.

The first money so borrowed by the plaintiff Norvena Lineker under such deed of trust was the sum of $2850.00. She subsequently borrowed other money thereunder in like manner from said McColgan, which she in like manner turned over to said Winter to be used in connection with rehabilitating the hotel belonging to said defendant Mary J.

Dillon and said moneys were expended for the use and benefit of said defendant Mary J. Dillon.

Note—defendants below in their answer allege as follows:

> "That after the execution of said deed of trust the said Norvena Lineker from time to time procured other advances thereunder until the amount due upon said deed of trust was in excess of the sum of $7000" (see transcript of record p. 26).

Several months after said moneys had been loaned under said deed of trust as aforesaid, and in or about the month of April, 1911, Daniel A. McColgan went to the plaintiff Norvena Lineker and demanded repayment of the moneys due under said deed of trust and told her that if she failed to pay same, he would cause her interest in said real property to be sold.

Thereupon the said plaintiff Norvena Lineker went to said defendant Mary J. Dillon and demanded of her that she immediately pay and satisfy the moneys borrowed for her use and benefit as aforesaid and also pay the interest, costs and expenses connected therewith *and also* that she, the said Mary J. Dillon, immediately effect the satisfaction and cancellation of said trust deed, and said plaintiff Norvena Lineker then and there told said defendant Mary J. Dillon that if she neglected or failed to pay such moneys or to forthwith cause said trust deed to be satisfied and discharged, the said plaintiff would immediately bring action at law against said

defendant Mary J. Dillon and her son William Winter to recover the amount due under such deed of trust.

Thereupon the defendant Mary J. Dillon asked and importuned said plaintiff Norvena Lineker to refrain from commencing or prosecuting an action against her or her son concerning the moneys secured by said deed of trust, and said defendant then and there promised and agreed with said plaintiff that if said plaintiff would refrain from instituting or prosecuting an action against said defendant Mary J. Dillon or her son concerning said moneys secured by said deed of trust that she, the said defendant Mary J. Dillon, would cause said debt and the interest, costs and expenses to be paid and satisfied and that she would indemnify and save harmless the plaintiff Norvena Lineker from any and all loss or damage whatever in connection with said trust deed. The said plaintiff thereupon and in consideration thereof refrained from bringing any action against said defendant Mary J. Dillon or her said son and she did not thereafter commence or prosecute any such action.

During the said year 1911 two hundred and fifty dollars was paid on account of interest due on the moneys secured by said trust deed, but no further payments were made until 1914 when proceedings were taken by McColgan to sell said real property under his trust deed. During this period from 1911 to 1914 a large amount of interest, costs, taxes and tax liens had accumulated against said property

and trust deed as well as attorney fees and the like. In 1914 McColgan sold said real property under his deed of trust and so manipulated the matter that he received for his rights under the trust deed, including costs, penalties, fees, and expenses claimed by him, the sum of $14,000.00 which amount was paid to him by giving him the net sum of $11,555.00 cash then loaned on the security of said real property by one Annie Connors, in the manner disclosed by the evidence introduced at the said trial, and in addition thereto giving *a second deed of trust on the said property for $2455.00,* and under this second deed of trust McColgan subsequently, in January, 1917, sold the land described in said original trust deed subject to the right therein of said Annie Connors.

Plaintiffs alleged in their complaint that the loss suffered by them by reason of the failure and neglect of defendant Mary J. Dillon to perform her said contract was the sum of $35,000.00.

Plaintiffs' complaint was filed on October 30, 1918. On November 7, 1918, defendants filed a demurrer to plaintiffs' complaint, alleging various grounds of demurrer. The demurrer was continued on the law and motion calendar from time to time, and on December 3, 1918, and *before any hearing was asked or had thereon, the defendants filed an answer to the merits, denying many of the allegations of plaintiffs' complaint and setting forth many new allegations of fact.* The demurrer was thereafter continued on the law and motion calendar for

several weeks and finally dropped from the calendar (see transcript of record p. 65). In due course the action came on to be tried by the court with a jury, and the trial lasted three days.

The evidence introduced on behalf of the plaintiffs at the trial (no summary of which is attempted to be made in this statement) was of so amazing a character that the trial judge in his instructions to the jury was moved to say:

> "Now, gentlemen of the jury, if that were the fact, if the evidence has established that to be the fact it would then constitute a contract which in law is known as a contract of indemnity, and if the party making it fails to keep it and damage has resulted to the one to whom it is made, it is, as I say, the subject-matter of a perfectly valid cause of action. That is the theory of the plaintiff's case. As you will observe from that, the main issue in the case is whether such a promise ever was made, because, of course, if the promise was not made, the plaintiff has no case, however grievously she may have suffered, *and goodness knows there stands out in this case the conspicuous fact, absolutely uncontroverted, that this woman has been, to use a cant expression, pigeoned, beyond the belief of ordinarily honest men.*" * * *

Evidence both oral and documentary was also introduced by defendants, and after full instructions by the court the case was submitted to the jury for their consideration and the jury duly returned a verdict in favor of the plaintiffs in the sum of $32,000.00. Thereafter motion for a new trial was made and after the plaintiffs had remitted $4000.00 the motion was denied.

During the whole course of the trial, which lasted three days, *not a single exception was taken to any ruling* made by the trial court, *nor was any exceptions taken to the instructions of the court,* but on the contrary counsel for both plaintiffs and defendants, in answer to a query of the court, *expressly stated* that they desired no further instructions and that they had no suggestions to make concerning the instructions given by the court.

On the case made on the writ of error herein, as presented to this court, the defendants in error would respectfully call the particular attention of this Honorable Court to the following rather unusual conditions:

(a) No bill of exceptions was made or filed herein because there were no objections or exceptions saved in the trial court.

(b) None of the evidence introduced at the trial is filed herein or presented to this court.

(c) The only *errors* that seem to be urged by plaintiffs in error herein are "such as appear upon the face of the complaint" (see brief of plaintiffs in error p. 2).

(d) There are no errors appearing "upon the face of the complaint" nor are there any errors showing upon the record and which it is not the office of the bill of exceptions to present, for the reason that *there was no ruling of any kind made by the court below concerning the pleadings.*

Note.—(The demurrer was abandoned and waived, no ruling therein being asked or made, and an answer to the merits filed, and trial had upon the issues made by the pleadings.)

(e) The *only rulings* made by the court below were the rulings made *on the questions of law arising at the trial*—and as to these *no objections were made nor exceptions saved.*

The defendants in error respectfully submit that the judgment of the court below should be affirmed by this Honorable Court for the following reasons:

1. Since no objections or exceptions were saved in the court below, *no questions of law arising at the trial can now be presented to or considered by this court.*

2. Since defendants' demurrer to the plaintiffs' complaint was waived and abandoned and no ruling thereon ever requested and no ruling ever made, *there is no error of the court below, appearing upon the record that can be passed upon by this court,* for the reason that (a) *the court below cannot be guilty of an error in a ruling that it has never made or upon an issue to which its attention was never called* (b) when the judgment of a trial court is challenged in error, *its rulings alone are open to consideration.*

3. The jurisdiction of the court to hear and determine the action is beyond question.

4. In the case at bar *there is no ruling of the trial court* either during the trial, or before, or after the trial, or with relation to the pleadings, *presented to this court for consideration.*

5. Since no error of the trial court is shown the judgment of that court should be affirmed by this Honorable Court.

I.

WHEN NO OBJECTIONS OR EXCEPTIONS WERE SAVED DURING THE TRIAL, NO QUESTIONS OF LAW ARISING AT THE TRIAL CAN BE PRESENTED TO OR CONSIDERED BY THIS COURT.

The rule relating thereto was recently declared by this court in Mitsui v. St. Paul Fire & Marine Ins. Co., (C. C. A. 9th) 202 Fed. 26-28, in the following language:

> "From an inspection of the bill of exceptions it is at once manifest that no objections or exceptions were saved, and *hence no question of law arising at the trial can now be presented to or considered by this court.*"

In Mexico Internat. Land Co. v. Larkin, (C. C. A. 8th) 195 Fed. 495-6, the Circuit Court of Appeals for the Eighth Circuit said:

> "In an action at law the burden is on the plaintiff in error to establish the existence of those errors of which he complains, and *in the absence of proof by the record* that a question of law arose, and that it was presented to and ruled upon by the court below, *no error is established, because none could arise concerning a question which was not presented, considered, or decided by the trial court.* Southern Pacific Company v. Arnett, 126 Fed. 75, 77, 61 C. C. A. 131, 133. Because there was no request and no ruling on a request, for a peremptory instruction in favor of the plaintiff, and because there was no exception to any ruling relative to the matters now assigned as error, *there is nothing in this case for this court to review.*
>
> *It is indispensable to a review* in the courts of the United States of any ruling of a trial court on the admissibility of evidence, or in the

> charge of the court, or the submission of the case to the jury *that the ruling of which complaint is made should be challenged, not only by an objection, but by an exception taken and recorded at the time,* to the end that the attention of the trial judge may be sharply called to the question presented, and that a clear record of his action and its challenge may be made. Potter v. United States, 122 Fed. 49, 55, 58 C. C. A. 231, and case there cited. The judgment below is affirmed."

In Mitsui v. St. Paul Fire Ins. Co., *supra,* this court further said:

> "Whenever *error* is apparent upon the record it is open to revision whether it be made to appear by bill of exception or any other manner,"

and the court therein specified as such error the erroneous overruling or sustaining of a demurrer. But, it is submitted, there must be *an erroneous ruling* to constitute such error.

There is one other question which this court might notice at any stage of the case and without the question being presented by a bill of exceptions, i. e., the one mentioned by Presiding Judge of this court on the argument hereof, to wit: a want of jurisdiction apparent upon the face of the record. But in the case at bar it is submitted that there is no error apparent upon the record, and neither is there any want of jurisdiction.

II.

THE DEMURRER IN THE COURT BELOW TO PLAINTIFFS' COMPLAINT WAS ABANDONED AND WAIVED.

As pointed out above in the statement of the case, before the defendants in the court below asked for or obtained any ruling upon their demurrer and while that demurrer was still upon the law and motion calendar they filed an answer to the merits denying nearly all of the allegations in the plaintiffs' complaint and setting up many new allegations of fact and thereafter the parties went to trial upon the pleadings so made. It is submitted that by so doing defendants waived any defects of the complaint, if there were any defects contained in said complaint.

In Oregon R. & N. Co. v. Dumas, (C. C. A. 9th) 181 Fed. 781, this court said:

> "The plaintiff in error contends that the complaint is fatally defective for failure to state a cause of action. A demurrer was interposed on this ground, *but it was waived by an answer to the merits.* In some respects the averments of the complaint are aided by the allegation of the answer."

In United Kan. Co. v. Harvey, (C. C. A. 8th) 216 Fed. 316-318, the court used the following language:

> "Such a practice can only serve as a trap. If the petition states a good cause of action but is technically defective, it should be raised by demurrer, and the plaintiff thus given an opportunity to amend. When an answer to the merits is filed, it is an admission on the part of the defendant that the petition is not technically

objectionable, and no defect of that nature can be taken advantage of thereafter. It is only when the defect of the petition is of such a nature *that it cannot be cured by the verdict of the jury,* and therefore can be taken advantage of by a motion in arrest of judgment after verdict, that is not waived by filing an answer. It is not right that the plaintiff should be misled by the defendant into the belief that there are no technical defects in his petition, and that his cause will be tried on the merits, and after he has been put to the expense of bringing his witnesses a considerable distance, which is usually the case when the cause is to be tried in a national court, and then, after the jury has been sworn, either taken a nonsuit or submit to a judgment against him, or at least consent to a continuance of the cause. It is true under the common-law practice, when pleadings were considered of greater importance than the substantial rights of the parties this practice was very common, but at this day it is universally recognized that courts are intended to promote the ends of justice and will disregard all technicalities which tend to defeat them. * * * In Bell v. Railroad Co., 4 Wall. 598, 18 L. Ed. 338, it was held that by a plea to the merits, and the parties going to a trial, *all antecedent irregularities are waived.* In Oregon R. R. & Navigation Co. v. Dumas, 181 Fed. 781 (104 C. C. A. 641), it was held that *'a demurrer to a complaint for want of facts is waived by an answer to the merits'.*"

In Bell v. Railroad Co., 4 Wall. (71 U. S.) 698-702, the court said:

"There is great confusion in the record in relation to the disposition of demurrers and pleas in abatement but as Bell filed a plea to the merits and the parties went to trial all antecedent irregularities were waived."

In Sledge v. Stolz, (May 15, 1919) 28 Cal. App. Dec. 1140-1144, the court stated the rule of law in California as follows:

> "On appeal all intendments are in favor of the regularity of the action of the court. Error will never be presumed and the burden is upon the appellant to show that it exists. (2 Hayne's New Trial, p. 1576.) In Meyers v. Canepa, 26 Cal. App. Dec. 1246, appellants claimed that the rule does not reach an error committed in passing upon the sufficiency of a complaint where the question is raised by demurrer. In reply the court said: 'Whatever may have been the interpretation put upon section 475 of the Code of Civil Procedure prior to the adoption of section 4½, article VI of the constitution, it settled that injury is no longer presumed from error, but must be affirmatively shown. (Vallejo etc. R. R. Co. v. Reed Orchard Company, 169 Cal. 545.) The provision is: "No judgment shall be set aside * * * for any error as to any matter of pleading, or for any error as to any matter of procedure, unless after an examination of the entire cause, *including the evidence,* the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." How can the court determine that defendants were injured by overruling the demurrer in this case *in the absence of the record showing what occurred at the trial?* It may have been that appellants consented to the trial upon its merits without objection to the evidence in support of the complaint, notwithstanding its defects. There may be presumptive waiver, which is a species of consent.'" * * *
>
> "In the recent case of Ransome-Crummey Co. v. Bennett, 171 Pac. 304, the question was directly before the court where, as here, there was a trial upon the merits after general demurrer improperly overruled and judgment, as here, on the findings, and *it did not appear* that the

> facts were such as that the complaint *could not* have been so amended as to obviate the objection made. The syllabus correctly states the rule as follows: 'Though by omission of an allegation, a complaint does not state a cause of action, and general demurrer thereto was improperly overruled, yet the record making it manifest judgment for plaintiff after a trial on the merits, was in no way based on or due to any defect in the complaint, it will not be sustained on the ground of insufficiency of the complaint; it not appearing it cannot be amended to obviate the defect.' "

In the case at bar the defendants filed their answer to the merits and without their demurrer having been brought to the court's attention or any ruling thereon made, and they thereby waived their demurrer.

Therefore *there was no ruling of the court below concerning the pleadings* nor was there any ruling made at any time prior to judgment except during the course of the trial.

But in addition to all of the foregoing the defendants in error submit that their complaint in the court below properly and fully sets forth and states a good cause of action against the defendants below; that such complaint contains all necessary jurisdictional allegations, both concerning the parties to the action and the amount in controversy, and further that the evidence introduced at the trial not only proved all the allegations of their complaint but *it amply supports the judgment rendered.*

III.

CONCERNING THE SPECIFICATION OF ERROR RELATING TO THE AMOUNT IN CONTROVERSY AS AFFECTING THE JURISDICTION

The plaintiffs below in their complaint allege under oath that the damages suffered by them by reason of the defendants' breach of the said contract of indemnity was the sum of $35,000.00.

The defendants below answered to the merits and denied that plaintiffs or either of them had been damaged in said or any sum or amount.

The case was submitted to the jury on the pleading and the evidence introduced at the trial and the instructions of the court, and the jury found that the plaintiffs had been damaged in the sum of $32,000.00 by reason of the defendants' breach of the said contract of indemnity, and judgment in favor of the plaintiffs in the court below and against the defendants was duly entered for the sum of $32,000.00 and costs.

It is submitted that this shows beyond cavil that the amount in controversy in the action exceeded the jurisdictional sum of $3000.

The rule relating thereto was stated by the Supreme Court in Smithers v. Smith, 204 U. S. 632-642, as follows:

> "The rule that the plaintiff's allegations of value govern in determining the jurisdiction, except where upon the face of his own pleadings it is not legally possible for him to recover the jurisdictional amount, controls even where the

declarations show that a perfect defense might be interposed to a sufficient amount of the claim to reduce it below the jurisdictional amount. Schunk v. Moline Co., 147 U. S. 500. In the last case the plaintiff's petition prayed judgment on several promissory notes, of which some, amounting to $530, were due, and others, amounting to $1664, were not due, the jurisdictional amount then, as now, being $2000. In holding that the court had jurisdiction of the claim this court, by Mr. Justice Brewer, said: 'Although there might be a perfect defense to the suit for at least the amount not yet due, yet the fact of a defense, and a good defense, too, would not affect the question as to what was the amount in dispute.' ''

See also:

Chesbrough v. Hotchkiss, 40 Sup. Ct. Rep. 237;

Mullins Lumber Co. v. Williamson, (C. C. A. 4th) 246 Fed. 232-233.

It is respectfully submitted that the contention of plaintiffs in error that the amount in controversy in this action is less than $3000, in view of the foregoing, is so frivolous as not to need further argument.

IV.

IF THERE IS NO RULING OF THE TRIAL COURT THAT THIS COURT CAN PASS UPON THERE CAN BE NO ERROR FOUND BY THIS COURT.

In deciding a similar point this court in Federal Mining Co. v. Hodge, (C. C. A. 9th) 213 Fed. 609, said:

> "The suggestion is made for the first time in this court. It was not brought to the attention of the court below, by any plea, proof or request for an instruction or ruling and no error is assigned to any action of the court below in regard to it. *This court can consider only errors of law in the rulings of the lower court* (citing many cases).

In Jones v. U. S., (C. C. A. 9th) 179 Fed. 584-592, this court stated the rule in the following language:

> "In an action at law this court is limited to the correction of the errors of the court below. Questions which were not presented to or decided by that court *are not open for review here,* because the trial court *cannot* be guilty of an error in a ruling that it has never made, upon an issue to which its attention was never called (citing many cases). In Robinson & Co. v. Belt, 187 U. S. 41, the province of the appellate court is stated in the following language: 'While it is the duty of this court to review the action of subordinate courts, justice to those courts requires that their alleged errors should be called directly to their attention and that their action should not be revised upon questions which the astuteness of counsel in this court have evolved from the record. It is not the province of this court to retry these cases de novo.' "

In Montana Ry. Co. v. Warren, 137 U. S. 348-351, the court said:

> "Error is alleged in the judgment of the Supreme Court of the Territory; and *if in all matters presented to it, its rulings were correct it cannot be affirmed that its judgment was erroneous,* because there were in the record matters not vital to the question of jurisdiction or the foundation of right, but simply of procedure to which its attention was not called and in respect

to which its judgment was not invoked. *All such matters must be considered as waived by the complaining party.*

"It is fundamental that when the judgment of a court is challenged in error *its rulings alone are open to consideration.*

"Of course if the trial court had no jurisdiction that is a matter which is always open, and the attention of the court of last resort may be called thereto in the first instance but mere matters of error may always be waived *and they are waived* when the attention of the reviewing court is not called to them."

V.

CONCERNING LIABILITY OF PLAINTIFF IN ERROR THOS. B. DILLON UNDER JUDGMENT OF THE COURT BELOW.

The judgment of the court below after deduction of the $4000 on the motion for a new trial is, that the plaintiffs below have and recover from the defendants the sum of $28,000.00 with interest and costs "and that said judgment be satisfied of the separate property of Mary J. Dillon and the community property of Mary J. Dillon and Thos. B. Dillon".

It is submitted that this judgment is correct and proper. Under the law of California, when a married woman is sued, her husband must be joined with her.

Code of Civil Procedure, section 370;
Horsburgh v. Murasky, 169 Cal. 500.

The husband's common law liability for the antenuptial debts of his wife still prevails in California.

In Van Maren v. Johnson, 15 Cal. 308-313, the court said:

> "The separate property of the wife and the common property of both husband and wife are equally liable for the debts of the wife contracted previous to her marriage and *judgments recovered for such debts may be enforced against either class or both classes of property indiscriminately.*"

This case has been many times cited with approval. It was quoted from at length in Henley v. Wilson, 137 Cal. 237, and the doctrine above set forth was declared to be the settled law of California.

The provisions of the judgment in the case at bar, ordering that the judgment be satisfied out of the separate property of Mary J. Dillon and the community property of Mary J. Dillon and Thos. B. Dillon *and exempting from the operation of the judgment the separate property of Thos. B. Dillon* is in accordance with section 170 of the Civil Code of California and is correct and proper in all particulars. But discussion of this matter in the case at bar would be of merely academic interest for the reason that Thos. B. Dillon has no separate property except what he received as a gift from his wife and *there is no community property of any kind or amount.*

It is respectfully submitted that there was no erroneous ruling of the trial court relating thereto.

VI.

THERE IS NO RULING OF THE LOWER COURT PRESENTED TO THIS COURT FOR CONSIDERATION.

As shown by the foregoing, there was *no ruling* made by the trial court *prior to the trial.* The demurrer having been waived in the manner hereinabove indicated, there was no request to the court prior to the trial to make any ruling whatever in the case nor was any ruling made, therefore it is respectfully submitted *there could be no error of the lower court prior to the trial.*

During the trial not a single exception nor objection was saved and, as stated by this court in the Mitsui v. St. Paul Fire Insurance Company, *supra, no question of law arising at the trial can under such circumstances be presented to or considered by this court.* Therefore it is submitted that there is no error of the trial court before this court for consideration and since "This court can consider only errors of law in the rulings of the lower court" (Jones v. U. S., *supra*) and since no rulings of the lower court are challenged or presented for review in the manner required by law, it is respectfully submitted that the judgment of the court below should be affirmed.

It is submitted that the writ of error does not present to this court a single error of the court below or discuss a single error of the court below. The case presented by the plaintiffs in error is a seeming attempt to have this court pass upon the *result* of the trial in the lower court without pre-

senting to this court any of the evidence upon which the case was decided.

The law of the State of California concerning the affirmance by appellate courts of the judgment of trial courts is as set forth in Sledge v. Stolz, *supra,* wherein the court quotes section 4½ of article VI of the Constitution of California, to wit:

> "No judgment shall be set aside * * * for any error as to any matter of pleading or for any error as to any matter of procedure unless after an examination of the enitre cause, *including the evidence,* the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

And the policy of the national courts relating thereto is set forth in the Act of February 26, 1919, amending section 269 of the Judicial Code so as to make the section read as follows:

> "Sec. 269. All of the said courts shall have power to grant new trials, in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law. On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

In Camp v. Gress, (June 2, 1919) 39 Sup. Ct. Rep. 478-482, the Supreme Court said:

> "And by the Act of February 26, 1919, (Public—No. 281—65th Congress), amending section

> 269 of the Judicial Code (Comp. St. § 1246) the duty is especially enjoined of giving judgment in appellate proceedings, 'without regard to technical errors, defect, or exceptions which do not affect the substantial rights of the parties'."

Wherefore the defendants in error submit that there is no error of law in any of the rulings of the lower court presented to this court for consideration in the manner required by law, and that therefore *there is no question which was decided by the lower court nor any ruling made by that court, which is now open for review by this court.*

The counsel for plaintiffs in error would seem to concede this to be true when he says in his brief on page 2 thereof, that "the assignment of errors urged by them are such as appear upon the face of the complaint" *and he thereafter fails to point out or even mention any error appearing upon the face of the complaint or even appearing upon the record.*

It is most difficult to answer such a brief when one is mindful of the rules promulgated by this court concerning the errors that this court will review and how such errors must be presented to it.

No attempt is made by plaintiffs in error to comply with the rules relating to the manner in which errors of law of the lower court shall be presented to this court for review but instead thereof and in utter disregard of all of such rules in his brief he sets forth several contentions unsupported by and unaccompanied by any of the evidence, seemingly

for the purpose of complaining of the judgment pronounced by the court below after a long trial, *but without pointing out or attempting to point out a single erroneous ruling or error of any kind, which is open for review by this court.* Counsel for defendants in error feels that he is not called upon, nor would he be justified in attempting, to answer such contentions although each and all of them might easily be shown to be without merit.

The defendants in error therefore respectfully urge that the judgment of the court below be affirmed, and if it shall appear to this court that the propositions advanced by plaintiffs in error are entirely wanting in substance and that writ of error herein was sued out merely for delay, the defendants in error ask that they be awarded such damages as to this Honorable Court may seem proper.

Dated, San Francisco,
June 5, 1920.

Respectfully submitted,
JOHN L. TAUGHER,
Attorney for Defendants in Error.

No. 3465

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MARY J. DILLON (formerly Mary J. Tynan) and THOMAS B. DILLON,
Plaintiffs in Error,

vs.

NORVENA LINEKER and FREDERICK V. LINEKER,
Defendants in Error.

REPLY BRIEF FOR PLAINTIFFS IN ERROR.

SAMUEL M. SHORTRIDGE,
Attorney for Plaintiffs in Error.

No. 3465

IN THE

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MARY J. DILLON (formerly Mary J. Tynan) and THOMAS B. DILLON,
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NORVENA LINEKER and FREDERICK V. LINEKER,
Defendants in Error.

REPLY BRIEF FOR PLAINTIFFS IN ERROR.

Pursuant to the order made at the oral argument of the above entitled cause, and in answer to the brief of the defendants in error filed since the argument, plaintiffs in error submit the following:

1. THE POINTS OF PLAINTIFFS IN ERROR REMAIN UNANSWERED.

With due respect to counsel for defendants in error, we submit that the brief filed herein by him on their behalf does not, in any respect, touch the real point to be decided by the court in this case. Counsel urges contentions which nobody has disputed, and he cites authorities upon propositions

which have been accepted by us *in limine*. Although we have accepted all the implications of the rule, he has devoted the greater portion of his brief to the support of the proposition that rulings at a trial cannot be complained of on a writ of error unless excepted to at the trial and thereafter made a portion of the record by a bill of exceptions.

And upon the real question, the question of the proper rule of damages to be applied to the facts stated in the complaint—the real point to be decided here—it is needless to point out that counsel has not questioned our position in any respect. We have urged it in several paragraphs of our brief, in particular in paragraph VI, and we have supported our propositions by abundant authorities. We noted in particular the cases of

Lowe v. Turpie, 44 N. E. 25;
Blood v. Wilkins, 43 Iowa 467.

Counsel has not even noticed these authorities nor questioned their force in any way, or indeed challenged our propositions as to the true measure of damages. He has cited no authority in opposition to the cases cited by us and from the fact that we have been unable to find any such, we may conclude that counsel was unable to cite authorities in opposition. Hence we are justified in concluding that the law is truly stated in such cases as Lowe v. Turpie and Blood v. Wilkins, and that counsel cannot gainsay our position on that point, which is the vital point in this case.

2. NO CONTROVERSY OVER LAW AS TO RECORD ON WRIT OF ERROR.

The law relating to the questions which may be considered on writ of error, is really well settled and may be summarized as follows:

(a) If the complaint is wholly defective in that it omits the averment of a material fact, the defect is always before the trial court as well as the appellate court, for the reason that the complaint does not support the judgment. The defect is commonly raised by general demurrer, but it need not be; it is not waived by failing to demur. The defect may be raised after judgment by motion in arrest; it is not cured by verdict. It needs no bill of exceptions to present it, for it arises upon the record or judgment roll; it is available whether a demurrer be interposed or not, or whether exceptions be taken at the trial or not.

World's Columbian Ex. v. Republic, 91 Federal 64, 76;

Slacum v. Pomeroy, 6 Cranch 224;

Ohio E. C. Co. v. Le Sage, 59 Cal. Dec. 331, 332.

(b) If the complaint contains the necessary facts but they are defectively stated, or if the complaint be inartificial or uncertain or ambiguous, such defects are deemed waived unless specially demurred to. If no demurrer be interposed, they are waived by answer over, or cured by verdict. While a bill of exceptions is not necessary, for the special demurrer and ruling thereon are already parts of the

record, the defect is not available in the appellate court unless a special demurrer be interposed and ruled upon, although an exception to the ruling need not be taken.

(c) If the complaint is sufficient, or being uncertain, it is answered without a demurrer, yet at the trial, errors are made against a party, either in receiving evidence or instructing the jury, such errors must be excepted to at the trial and preserved in a bill of exceptions in order to be reviewed on a writ of error.

Counsel in paragraphs I, II, IV and VI of his brief, has reiterated again and again the rule last referred to and has cited numerous cases in support. His reasoning might be in point if it were in answer to any argument of ours as to a given error of law made at the trial in *receiving testimony* or *instructing* the jury, but we have argued no such "trial errors" in our opening brief; we are unable to appreciate the relevancy of his argument upon these questions, for the points we have urged, whether well taken or not, are within the rules stated in the first paragraph above.

These propositions are no longer debatable. Thus in the case of

> World's Columbian Ex. v. Republic, 91 Federal 64, 76, the

the court said:

> "It is fundamental that a judgment cannot stand unless the facts of record,—apart from any showing by a bill of exceptions, aided as

far as may be by the verdict, will support it. *This rule holds equally where no point of the kind was made before the trial judge, either by demurrer* or motion in arrest of judgment. Slacum v. Pomeroy, 6 Cranch. 224; United States Bank v. Smith, 11 Wheat. 172; Funk v. Piper, 50 Ill. App. 163; Pennsylvania Co. v. Congdon, 134 Ind. 226; 33 N. E. 795. In entering the judgment the trial judge necessarily rules or assumes that the record itself—not matters to be presented by bill of exceptions, contains the showing of fact on which such judgment may be lawfully predicated. If the record be insufficient, then, in strictness, the error occurs in entering the judgment. Where there was neither a demurrer nor motion in arrest there may have been no error of any kind up to the entry of judgment."

The case of

New Orleans Ins. Ass'n v. Piaggio, 83 U. S., (16 Wall.) 378; 21 L. ed. 358,

cited in the opening brief for plaintiffs in error, is to the same effect. That is a very instructive authority which supports our position here, and bears a very striking analogy to the case at bar. There the action was upon contracts of insurance, under which circumstances the measure of damages would have been the value of property lost. This value was alleged and established and found by the jury. But the plaintiff had claimed in his complaint, in addition to the value of the property lost, the further sum of $15,000.00 as damages for the delay and failure to pay the loss when due, and $5000.00 was allowed as such damages.

Upon a writ of error to the Supreme Court of the United States it was urged, that an erroneous rule of damages was applied by the lower court in sustaining the verdict and entering judgment, in that the damages for failure to pay the amount of the policy could only have been interest on the sum found due, and that other damages for such delay were too remote. And it was further urged that such was error "on the face of the record without any reference to any possible evidence or ruling at the trial". Touching the latter point the court said:

> "Errors apparent in other parts of the record may be re-examined, as well as those which are shown in the bill or bills of exceptions, and it is too plain for argument that the verdict and judgment are a part of the record. Whenever the error is apparent in the record the rule is that it is open to re-examination, whether it be made to appear by bill of exceptions or in any other manner; and it is everywhere admitted that a writ of error will lie when a party is aggrieved by an error in the foundation proceedings, judgment or execution of a suit in a court of record."

It is true that in the case there were five several bills of exceptions. These are referred to *seriatim* at the close of the opinion and held not well taken. They do not present the point above referred to; it was considered that such point arose on the record alone. In the last analysis the point really arose on the complaint. The complaint stated the controversy, and set out the relevant facts from which the court could apply the proper rule of damages to be allowed on account of the breach of contract

averred. When it appeared that the verdict and judgment was far in excess of the proper rule of damages flowing from the facts averred, the Supreme Court modified the judgment and reduced the verdict and judgment to a proper amount.

Here the controversy is practically the same; the contract is set forth in the complaint; a breach is alleged, whereupon it became a question of law for the trial court in the first instance and for this court now to apply the legal measure of damages. And if we are right in our contention as to the proper measure of damages in this case, it is manifest that the verdict and judgment are far in excess of the true damages properly allowable. Accordingly such a point arises upon the record without the necessity for a bill of exceptions and without any reference to any possible evidence or ruling at the trial, just as a similar situation in the Piaggio case enabled the appellate court to review the controversy and modify the judgment accordingly. Hence, it appears that there is no tenable objection to a hearing of the points urged by plaintiffs in error on the merits, that the questions argued arise upon the record that is now before the court.

Counsel is not entirely fortunate in his citation of authority. Thus the case of

> Mitsui v. St. Paul Fire & Marine Ins. Co., 202 Federal 26, 28,

cited at the opening of his brief, is really against him. For following the quotation contained in his brief, the opinion proceeds:

> "But this is no obstacle to the court's considering such questions as may arise upon the record and which it is not the office of the bill of exceptions to present."

And, again, it is said:

> "Whenever error is apparent upon the record, it is open to revision whether it be made to appear by bill of exceptions or *in any other manner.*"

Thereupon the court proceeded to consider the sufficiency of the complaint, and finding it insufficient reversed the case. It gave consideration to the contract of the parties, which was set forth in the complaint as an exhibit, and determined that upon the conceded facts the plaintiff was not entitled to recover the sum awarded. Such is exactly what we are urging the court here to do, viz.: To consider the contract of the parties which was set forth in the complaint, and determine the proper rule of damages, which being determined, it will appear that the verdict and judgment are unsupported by the complaint as to a large amount.

We have not space to refer in detail to the other cases cited by counsel on the law of appeal and error, but on examination it becomes clear that he has not entirely apprehended the meaning of the cases cited, and that not one of the cases militates in any way against the propositions of the law of record on appeal hereinabove stated, but that they entirely support them.

3. RELIEF ON APPEAL WILL BE GIVEN WHERE THE JUDGMENT IS ONLY IN PART SUPPORTED BY THE COMPLAINT.

Our contention on this writ of error has been twofold. We urge in paragraph XI, that for the reason therein set forth, the complaint is insufficient to support any judgment in favor of plaintiffs. But we have also urged that, conceding that the complaint may be sufficient to support a judgment for a certain sum against defendants, it is insufficient to support the judgment rendered as to a large amount. In such case it is a mere truism of appellate practice that the judgment must be modified or scaled so as to remain supported by the complaint. Thus, if the complaint be in two counts, one bad, and the judgent is for the full amount claimed in both, it must be modified by being reduced to the amount of the good count. Or the judgment may be supported by the complaint as to one party and not as to another; it will be modified so as to relieve from its operation the party as to whom it is unsupported by the complaint. Here the situation is exactly the same. If the full damages that can be allowed under the conceded facts would be twenty-eight hundred and fifty ($2850.00) dollars and interest, then the judgment is unsupported as to the excess over that amount.

For example, suppose a plaintiff avers that a defendant made to him a promissory note for $2850.00 and interest, that the note is past due and the defendant has failed to pay and in his prayer plaintiff prays for judgment ten times the amount called for by the note and obtains a verdict for the amount

prayed. Would any one contend that upon appeal or writ of error, an appellate court would not hold that the judgment was unsupported, would not, as a matter of law, apply the proper rule of damages to the breach of contract shown, and when it appeared that the judgment far exceeded any legal amount of damages that could flow from the conceded facts, it would not either modify the judgment if it had sufficient data, or send the cause back for a new trial if it had not? And would it be contended that the appellate court would be prevented from such a just decision because no demurrer had been interposed or ruled upon, or because no objections were taken at the trial or preserved in a bill?

Where a judgment is only in part supported by the averments of the complaint, the appellate court on appeal will, on the record alone, either reverse the judgment or so modify it as to remain not unsupported.

New Orleans Ins. Ass'n v. Piaggio, 83 U. S., (16 Wall.) 378; 21 L. ed. 35;
S. F. Sav. Un. v. Myers, 76 Cal. 624;
Cummings v. Cummings, 75 Cal. 434, 442.

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4. A DEMURRER WAS NOT NECESSARY.

Counsel argues, in subdivision II of his brief, that the demurrer in this case was abandoned or waived. But we need not further notice this point. We have not argued any questions which were nec-

essarily raised by special demurrer. The points we have urged, if well taken, would be reached by general demurrer, and as far as the demurrer was general, it need not be interposed or ruled upon at all. The point would arise upon the complaint without a demurrer. Again counsel has raised a straw man.

World's Columbian Ex. v. Republic, 91 Fed. 63;

Western U. Tel. Co. v. Sklar, 16 Fed. 295, 302;

Ohio E. C. Co. v. Le Sage, 59 Cal. Dec. 331, 332.

The California case of

Sledge v. Stolz,

is cited in this connection; and the claim is apparently made that under section 4½ of article VI of the Constitution of California, the matters here urged can not be reviewed. But while that section, like charity, has covered a multitude of sins, even if it were applicable to federal procedure, it could not be considered as making up for a *material deficiency* in the *complaint*. It is designed to cure mere errors of procedure—adjective law—which do not deprive of a substantial right, but where the issues between parties is, as here, a matter of substantive law, it can have no application.

The same may be said of section 269 of the Federal Judicial Code as amended. If it be given effect in considering questions of ultimate right between the parties, it would be construed to allow the appellate

court to look beyond mere deficiency in assignment of error, or failure to except, and base its judgment upon the real merits of the controversy. Such a construction has been given to section 269 as amended, in a criminal case. But the implication which counsel seeks to deduce from the holding of the California Appellate Court in Sledge v. Stolz, has been negatived by the later decision of the Supreme Court of this State, in the case of Ohio E. C. Co. v. Le Sage, supra.

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5. THE COMPLAINT IS NOT AIDED BY ANSWER.

The answer consists generally of denials, adding nothing to the record. Counsel quotes, however, an allegation from the answer appearing at page 26 of the Transcript, to the effect that after the execution of the deed of trust, Lineker, from time to time, procured other advances thereunder until the amount due upon the said deed of trust was in excess of the sum of $7000.00.

Apparently it is claimed that this constitutes an aider by answer, but it cannot be taken as such aider for several reasons. No such averment of an answer can be considered as an aider of a complaint unless the allegations would have been sufficient to meet the defect, if in the complaint.

> Hibernia Sav. etc. Sy. v. Thornton, 123 Cal. 62, 64.

Here nothing appears to the effect that Mrs. Dillon ever agreed to stand good for such future ad-

vances. It would be remarkable if she had done so. At the time her promise was made, it appears that demand of payment was only of the $2850.00 debt: "*Said note* and interest." Moreover, if the amount, within Mrs. Dillon's promise was $7000.00 instead of $2850.00 and interest, it would still be many thousands below the amount of the judgment. Therefore, the particular defect in the complaint, urged here, was not aided by answer.

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6. THE DISTRICT COURT WAS WITHOUT JURISDICTION OF THE CAUSE.

We may concede that our point in regard to the defect in the jurisdiction of the District Court, is dependent upon our construction of the complaint, as hereinabove discussed. If it be true that the only damages supportable on the complaint, would be the amount of the McColgan note and interest, then manifestly the case is within the express holding of the case cited by us on the point.

Vance v. W. A. Vandercook Co., 170 U. S. 468; 42 L. ed. 1111.

The case is not one where the amount claimed may be reduced by defensive matter brought in the case by answer; therefore, the cases cited by counsel do not apply.

7. PLAINTIFFS IN ERROR HAVE CONFORMED TO THE RULES OF THIS COURT.

Animadversion appears at page 22 of counsel's brief in respect of our alleged "utter disregard of all of such rules" in our brief, and that no attempt is made by us "to comply with the rules". A moment's consideration may be given to obedience to the rules by counsel respectively.

Under rule 24 of this court, we were required to open our brief "with a concise abstract or statement of the case". To this rule we have strictly conformed. Since no bill of exceptions could have been obtained and we were confined to the record, and saw that the questions we sought to raise, appeared from the complaint alone, proper compliance with the rule required us to set forth the substance of the provisions of the *complaint*. This we have strictly and correctly done in pages 2-5 of our brief.

The rule further provides that the defendants in error need not make such a statement, "unless that presented by the plaintiff in error is controverted". They have made such a statement in pages 1-6 of counsel's brief. We particularly invite the court to compare the accuracy of the respective statements as to agreement with the averments of the complaint, in pages 1-11 of the transcript. It will be noted that counsel's statement is not correct; that it does not appear from the complaint that the trust deed given to McColgan was "also to secure future advances", or "also to secure all costs and liens

that might be thereafter unpaid upon the lands", or "also to secure all expenses that might be incurred by the McColgan's in connection therewith" (see paragraph XIII of the complaint, Tr. p. 7).

It is there alleged, that *a promissory note* was made to McColgan for *$2850.00* and that a trust deed was given "to secure the payment *thereof*". Not a word is said as to the other features. The statement is further inaccurate in that it is not alleged in the complaint that any money was subsequently borrowed by Lineker, or that she turned over such sums to Winter, or that Lineker thereafter demanded of Dillon that she pay those sums, or any sum but the $2805.00 note, or that Dillon promised to pay any McColgan debt other than the $2850.00.

It will be noted therefore, that the statement of plaintiffs in error, not only conformed to the rules, but is strictly accurate, and that the statement of defendants in error is not accurate.

It is also insisted, that plaintiffs in error can not have a consideration of the evidence in this case on account of the failure to except to rulings at the trial, or to preserve such exceptions in a bill. Yet counsel does not hesitate, himself, to import into the record evidence and instructions, and to base his argument in part upon such matters entirely *de hors* of the record (see pages 4, 5 and 6 of brief for defendants in error).

8. THE STATEMENTS OF COUNSEL DE HORS THE RECORD MAY YET BE CONSIDERED AS ADMISSIONS AGAINST INTEREST.

The matter above referred to, set forth in the brief of defendants in error, contrary to rule, while it cannot avail them anything, may be considered against them as far as it constitutes an admission against interest. An appellate court may take statements of a brief on appeal as true, where they are in the nature of admissions against interest. This rule was applied by the Circuit Court of Appeals of the Third Circuit, in the case of

Pitcairn v. Philip Hiss Co., 113 Fed. 492, 495.

Accordingly, if the court will give consideration to the statement contained in counsel's brief in the paragraph beginning at the bottom of page 4, in connection with the averments of paragraph XXI of the complaint (Tr. p. 10), our argument, in subdivision 7 of our opening brief at page 20, will appear even more pertinent.

It thus appears, even more clearly, that the alleged loss of Svensen's property was not under proceedings taken under the trust deed referred to in Mrs. Dillon's alleged promise. It was alleged in the complaint that Svensen's loss of property was under "various *other* proceedings had and taken by and on behalf of McColgan". It now appears from the statement that such "other proceedings" were a sale in 1917 under a second and entirely different

trust deed from the one referred to in the complaint. That certainly would not be the proximate result of any alleged breach of Mrs. Dillon's promise; damages flowing from said last sale, under all rules, would be entirely too remote; Svensen could just as well have pursued Dillon all through her life for any loss through unfortunate investments, upon the theory that her solvency might have been weakened by the original transaction.

It does not *appear* from the *complaint* that there was any loss of property to Svensen from any sale under the first trust deed. It is made clear from counsel's *statement,* that there was *no such loss,* for immediately Svensen borrowed money from one Connors on the *security* of the *property,* and at the same time gave a second trust deed thereon to McColgan, and she *continued* to *own* the *property,* or *interest thereon,* until the final sale under the second trust deed in 1917. It must be clear that if she redeemed from a sale under the first trust deed in 1914, or, if what amounted to the same thing, she caused the property to be bid in by her representative at that sale, then under any view, the value of the real property would have had no relation to her alleged loss.

In any view Svensen's loss in 1914, on account of the first trust deed, could only have been the amount she was justly to pay McColgan thereunder. This, from counsel's statement could *not have exceeded $14,000.00,* but it was certainly even less than that,

for Mrs. Dillon was not responsible if McColgan "so manipulated the matter that he received" a greater sum than was justly due him. Mrs. Dillon, as we have shown in paragraph 7 of our opening brief, was not responsible for McColgan's wrongful acts, which constituted the "pigeoning" of Svensen referred to in the instructions quoted by counsel.

According to the complaint, Mrs. Dillon only agreed to pay the $2850.00 note. If that sum was afterward enhanced either by Svensen's further borrowings for her own use, or by McColgan's wrongful exactions, Mrs. Dillon would not be responsible. Yet we learn from counsel's statement, that aggregating all of such elements, whether with or without right, the total obligation could not have exceeded $14,000.00; yet judgment was entered for $28,000.00.

CONCLUSION.

Mindful of the limitations of appellate practice as to questions that may be agitated, we have wholly refrained from discussing the evidence in this case. Had we been able to bring the evidence here, we would be required to accept as conclusive facts found upon conflicting testimony.

But our silence upon those questions may not be construed to mean that we concede that the contract sued upon was ever made, or that it is not incredible that, if made, Mrs. Dillon would have been sued upon it long before, especially so, when for upwards of

seven years the efforts of Miss Svensen, according to her claim, were concerned in financing and taking care of the original McColgan debt, and when during that time, at least two actions were commenced against her by Mrs. Dillon wherein she set up counterclaims; yet at all times she was silent as to the alleged original verbal promise of indemnity.

Yet accepting as perforce we must, the claim of Svensen, as to the making of this contract, we are entitled to rely strictly upon the averments of her complaint. And from such allegations together with the above mentioned statements of counsel, this court is enabled to reach close to the heart of the next real controversy in the case,—the question of the true amount of Svensen's proximate damage from the facts pleaded.

As to those questions, we are entitled to ask the court, under the provisions of section 269 of the Federal Judicial Code, cited by counsel, to look at the entire record *now* before the court, and to disregard technical errors, defects and exceptions; to look through and beyond them to the real controversy and to decide this case, as to this point, upon the ultimate merits, and to hold that Mrs. Dillon is not responsible for either remote consequences, or for the neglect of Svensen, or wrongful acts of McColgan. Under no conceivable circumstances, in view of the facts pleaded and the facts adduced by counsel, could the judgment justly have equaled the amount for which it was rendered.

Again we submit, that as to the real controversy, the measure of damages, counsel is wholly silent; that our position is well based, supported by authority, is absolute justice, and should secure to us a reversal of this case to the end that justice may be done.

Dated, San Francisco,
June 21, 1920.

SAMUEL M. SHORTRIDGE,
Attorney for Plaintiffs in Error.

No. 3465

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MARY J. DILLON (formerly Mary J. Tynan) and THOMAS B. DILLON,
Plaintiffs in Error,

vs.

NORVENA LINEKER and FREDERICK V. LINEKER,
Defendants in Error.

PETITION FOR A REHEARING ON BEHALF OF PLAINTIFFS IN ERROR.

SAMUEL M. SHORTRIDGE,
Chronicle Building, San Francisco,
Attorney for Plaintiffs in Error and Petitioners.

No. 3465

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MARY J. DILLON (formerly Mary J. Tynan) and THOMAS B. DILLON,
Plaintiffs in Error,

vs.

NORVENA LINEKER and FREDERICK V. LINEKER,
Defendants in Error.

PETITION FOR A REHEARING ON BEHALF OF PLAINTIFFS IN ERROR.

To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Plaintiffs in error respectfully petition the United States Circuit Court of Appeals of the Ninth Circuit, for a rehearing of the above entitled cause following the judgment and opinion of said court, filed therein on July 6, 1920, whereby the judgment of the United States District Court of the Northern District of California, Second Division, was

affirmed; and they respectfully ask and urge that further consideration should be given to certain propositions of law, and particularly to the first point urged and discussed in their brief as well as on the oral argument.

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1. EVEN IF THE OBLIGATION OF MRS. DILLON WAS SPECIAL, THE QUESTION OF THE TRUE MEASURE OF DAMAGES REMAINS.

The plaintiffs in error have heretofore argued that, taking the allegations of the complaint at face value, they did not show any greater amount to be in controversy than the McColgan debt alleged to be $2850.00, and that the verdict and judgment for the greater amount was unsupported by the complaint. In the opinion it is conceded that, where a contract to pay a specific sum of money is broken, the damages are measured by the sum stipulated. But the case at bar is sought to be distinguished under a principle stated in 17 C. J., 863,

> "That where the obligation to pay money is special and has reference to objects other than the mere discharge of a debt", "the special damages may be recovered according to the actual injury".

The term "special contract" is not to be deemed as embracing all contracts other than mere promissory notes; strictly speaking, such a contract is one containing provisions not commonly found in a contract of the same class or nature. The contract in

the case at bar is not a special contract within such a definition, for it contains no particular provision not found in all agreements to discharge mortgage debts. It does not contain intricate provisions such as, for example, were contained in the contract construed in Bixby-Thiesen Co. v. Evans, cited in the opinion.

Moreover an action upon an obligation containing promises that may be said to be special, nevertheless is governed by legal rules as to measure of damages. It is not to be considered that the amount of damages is an open question, as in an action for tort. Be the agreement ever so special, the question of the true measure of damages for the particular breach still remains.

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2. THE TRUE RULE OF DAMAGES FOR THE ALLEGED BREACH OF MRS. DILLON'S OBLIGATION IS SET FORTH IN THE CASE OF LOWE v. TURPIE, CITED IN OUR OPENING BRIEF.

The genesis of the statement quoted from Corpus Juris is easily traced. The statement is found in the Alabama case cited, and from that it may be traced back to Section 77 of Sutherland on Damages. But the statement made in Sutherland is merely the preliminary statement of the general rule to which a qualification is conceded as applying to a case like the one at bar, for the author after stating the rule, as quoted from Corpus Juris, in the opinion, continues in the same section to say:

> "Where one person furnishes money to another to discharge an encumbrance upon the land of the person furnishing the money, and the person undertaking to discharge the encumbrance neglects to do it, and the land is lost to the owner by reason of the encumbrance, the measure of damages may be the money furnished, with the interest, or the value of the land lost, according to circumstances. If the landowner has knowledge of the agent's failure in *time to redeem the land himself,* his damages will be the *money furnished, with interest.* But if the landowner justly relies upon his agent to whom he has furnished money to discharge the encumbrance, and the land is lost *without his knowledge,* and solely through the fault of the agent, the latter will be liable for the value of the land at the time it was lost."

The authority relied upon in the opinion rests ultimately upon Section 77 of Sutherland's work from which the above quoted excerpt is taken. And this excerpt is quoted, and the qualification therein indicated is applied, in the important case of Lowe v. Turpie, 44 N. E. 25, upon which we relied in our opening brief. It is further important to note that in the recent edition of Sutherland's work, both the cases of Lowe v. Turpie and Blood v. Wilkins, upon which we rely, are cited with approval in this very Section 77, and the qualifications indicated in these cases are made a portion of the text. Again we say we are justified in concluding that the law is truly stated in these two cases, and that they declare the true rule of damages in the case of an obligation of the character sued upon

her. The opinion does not note or discuss these cases.

Tested by the declarations in Lowe v. Turpie and Blood v. Wilkins, it is apparent that the complaint at bar is not sufficient to sustain a judgment for any more than the amount of the McColgan debt.

It does not appear that Svensen did not have knowledge in ample time to enable her to raise the money and prevent the sale of her property. It does not appear that the trustee's sale was speeded; in fact, the reverse appears. And no just reason whatever appears from the complaint why the small sum of the debt could not have been borrowed on property of the value stated, in spite of the existence of the outstanding life estate. We may note, that if the latter fact has any bearing, it would be important to show by the allegations of the complaint that the life estate had not fallen in at the time the property was taken for the debt; it appears that it fell in on August, 1916; the pleading does not show but that the sale was at a later date.

As these are material questions, the defendants in error must be deemed to have stated their case as favorably to themselves as the facts will warrant, and therefore it must be held that the trustee's sale was subsequent to the termination of the life estate, and that Svensen knew of an impending trustee's sale in good time and could have borrowed the money elsewhere on the credit of this valuable

property, even if she had no other assets. And the circumstance must not be ignored, that Mrs. Dillon, if she made the contract at all, breached it by failing to pay the McColgan debt within a reasonable time after April, 1911, and Svensen could have pursued her for the amount of that debt in the same manner she is now doing, and having recovered the money prevented the sale of her much more valuable property.

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3. EVEN IF THE ALLEGATIONS OF THE COMPLAINT COULD BE CONSTRUED SO AS TO SHOW AN AMOUNT IN CONTROVERSY IN EXCESS OF THE JURISDICTIONAL AMOUNT, NEVERTHELESS THEY FALL FAR SHORT OF JUSTIFYING THE MUCH LARGER SUM AWARDED BY THE VERDICT AND JUDGMENT.

The opinion makes the point, that Mrs. Dillon's promise to pay the McColgan debt in April, 1911, must be held to embrace not only the principal of the McColgan debt but also the accrued interest. It is true that if the interest be computed at the legal rate up to that time, the amount of principal and interest would have slightly exceeded $3000.00. But the complaint does not show that any particular amount of interest had accrued and *was unpaid* at the time of making the promise *non constat* but that a portion or all of such interest had been paid.

But be that as it may, such an assumption or such a construction of the complaint would only result in the fact that the complaint showed a liability for a debt slightly in excess of $3000.00, together with

legal interest thereon to date; but that sum would be many thousands of dollars less than the amount awarded. The failure of the complaint to state facts to support the full amount of the judgment is just as important as the failure to state facts showing the jurisdictional amount to be in controversy. The plaintiffs in error are entitled on this writ of error to have relief from such excessive verdict and judgment.

New Orleans Ins. Assn. v. Piaggio, 83 U. S. 378; 21 L. ed. 358;

World's Columbian Exposition v. Republic, 91 Fed. 64, 76;

Vance v. W. A. Vandercook Co., 170 U. S. 468; 42 L. ed. 1111.

Accordingly we have shown that the authority of the case of Lowe v. Turpie, supra, is in no respect weakened or overthrown by any authority cited in the opinion, but that in fact it is recognized and approved by Mr. Sutherland as a qualification of the very language reproduced in the opinion. And we think it must be clear that, tested by the principles of the case of Lowe v. Turpie, the complaint fails to state any facts sufficient to show that any damages claimed to have been suffered by Svensen over and above the amount of the McColgan debt, was any proximate consequence of anything that Mrs. Dillon did or left undone.

Accordingly I urge that a rehearing of the said cause be granted to the end that the court may give further consideration to the points above discussed

and the bearing thereon of the well considered authorities heretofore cited in support.

Dated, San Francisco,
August 2, 1920.

Respectfully submitted,
SAMUEL M. SHORTRIDGE,
Attorney for Plaintiffs in Error and Petitioners.

CERTIFICATE OF COUNSEL.

I hereby certify that I am counsel for plaintiffs in error and petitioners in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco,
August 2, 1920.

SAMUEL M. SHORTRIDGE,
Counsel for Plaintiffs in Error and Petitioners.

No. 3468

United States Circuit Court of Appeals

For the Ninth Circuit.

In the Matter of the CRAIG LUMBER COMPANY, a Corporation,

Bankrupt.

E. L. COBB, Trustee of the Estate of CRAIG LUMBER COMPANY, a Corporation, Bankrupt,

Petitioner,

vs.

MacDONALD–WIEST LOGGING COMPANY, a Corporation,

Respondent.

Petition for Revision

Under Section 24b of the Bankruptcy Act of Congress, Approved July 1, 1898, to Revise, in Matter of Law, a Certain Order of the United States District Court for the Territory of Alaska, Division No. 1.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 3468

United States

Circuit Court of Appeals

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the United States Circuit Court of Appeals for the Ninth Circuit.

IN BANKRUPTCY—No. 31.

In the Matter of the CRAIG LUMBER COMPANY, a Corporation,

Bankrupt.

Petition for Revision of Order of the District Court.

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The petition of E. L. Cobb respectfully shows as follows:

I.

In the District Court for Alaska, Division Number One, at Juneau, a proceeding was begun on the 25th day of February, 1919, to have the Craig Lumber Co., a corporation adjudged a bankrupt. Thereafter on the 19th day of March, 1919, the aforesaid Craig Lumber Company was duly adjudged a bankrupt, and thereafter, in the same proceedings, your petitioner became the duly elected and qualified trustee in bankruptcy of its estate under the laws of the United States.

II.

Thereafter in due course, the McDonald-Weist Logging Company, a corporation duly organized under the laws of the State of Washington, filed a claim against said estate for the sum of $27,871.50 or thereabouts.

III.

That your petitioner, as trustee aforesaid, objected to the allowance of said claim, or any part thereof on

the ground that the same was not a provable claim in bankruptcy, for the reason that the said claim was for sums alleged to be due under a contract by and between [1*] the claimant and the bankrupt, made and performed in Alaska, and growing out of business in Alaska, and that at the time of the making of said contract, and at all times thereafter the said claimant had not complied with the laws of Alaska governing foreign corporations doing business in Alaska, and was not qualified to do business in Alaska, and that the contract which was the basis of the claim was void.

IV.

The matter came on thereafter to be heard before the Honorable H. B. Le Fevre, Referee in Bankruptcy, and upon such hearing the Referee found the following facts:

1. The McDonald-Weist Company is a corporation of the State of Washington.

2. The contract upon which the claim in controversy is based, and out of which it grows, was made in the Territory of Alaska on the 2d day of January, 1918, and was to be performed entirely within the Territory of Alaska.

3. On December 12th, 1917, the McDonald-Weist Company filed in the office of the Clerk of the District Court for the First Division only the following papers, to wit:

(a) A certified copy of its charter or Articles of Incorporation.

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*Page-number appearing at foot of page of original certified Transcript of Record.

(b) Its written consent to be sued, and the appointment of L. J. McDonald as its agent.

(c) A document attached to document (b) filled out in the handwriting of L. J. McDonald, which was in form an acceptance of the appointment, but the same was never subscribed by the said L. J. McDonald.

4. The McDonald-Weist Company filed in the office of the Secretary of State for Alaska, only the following documents at the dates mentioned, to wit: (a) Charter filed January 28th, 1918. (b) Appointment of agent and acceptance of appointment filed January 28th, 1918. (c) Annual statement filed February 16th, 1918. (d) Annual statement filed February 27th, 1919. [2]

5. The Annual Statement filed February 16th, 1918, was not verified by the President and Secretary of the McDonald-Weist Company, nor attested by the directors, and the Annual Statement filed February 27th, 1919, was not attested by a majority of the directors.

Which said findings were acquiesced in as correct by the said McDonald-Weist Co.

V.

That the said Referee thereupon ruled and decided that the said claim of the McDonald-Weist Logging Company was not a provable claim in bankruptcy and made and entered an order and decree disallowing the same and expunging it from the list of claims.

VI.

Thereafter such proceeding were had in said matter that the ruling and decision of the Referee was

brought into the said District Court upon the said facts and the law arising thereon upon a petition of review, and was argued by counsel, and thereafter on the 3d day of February, 1920, the said District Court for Alaska made and entered an order reversing the decision of the Referee, and remanding the cause for further proceedings.

VII.

Your petitioner, considering himself aggrieved by this order of the District Court, respectfully applies to this Honorable Court for a revision and review thereof, to the end that the said claim of the said McDonald-Weist Logging Company may be held not a provable claim in bankruptcy and the decision of the Referee disallowing and expunging said claim may be affirmed, and the action of the District Court reversing said decision of the Referee may be corrected, and such orders may be made by this Court as are necessary to that end. For that purpose your petitioner annexes hereto a certified copy of so much of the record as will enable this Honorable Court to review and correct the action of the District Court with due care and justice to all concerned. [3]

E. L. COBB,

Trustee in Bankruptcy of Craig Lumber Co., Bankrupt, Petitioner.

J. H. COBB,

Counsel for Petitioner.

United States of America,
Territory of Alaska,—ss.

E. L. Cobb, being first duly sworn, on oath deposes and says: I am the petitioner above named. The

facts set forth in the above and foregoing petition are true to the best of my knowledge and belief.

E. L. COBB,

Subscribed and sworn to before me this the 24th day of February, 1920.

[Seal] J. H. COBB.

Notary Public in and for Alaska.

My commission expires June 8, 1923.

The above and foregoing petition is allowed this the —— day of February, 1920.

_____,

Judge, [4]

CLERK'S CERTIFICATE.

United States of America,
District of Alaska,
Division No. 1,—ss.

I, the undersigned, Clerk of the District Court for the District of Alaska, Division No. One, do hereby certify that the hereto attached is a full, true and correct copy of the original "Claim of McDonald-Wiest Lumber Co."; "Objections by Trustee to Claim of McDonald-Weist Lumber Co."; "Order of Referee, Expunging Claim of McDonald-Weist Lumber Co."; "Notice of Appeal"; "Certificate by Referee"; "'Minute Order Reversing Referee"; "Court Order Reversing Referee"; in Cause No. 31—In Bankruptcy, on file and of record in my office.

IN TESTIMONY WHEREOF, I have hereto subscribed my name and affixed the seal of said court at

Juneau, Alaska, this twentyfourth day of February, 1920.

[Seal] J. W. BELL,

By ————————————,

Deputy. [5]

In the District Court for the District of Alaska, Div. No. One, at Juneau.

Claim No. 31.

IN BANKRUPTCY—No. ——.

In the Matter of the CRAIG LUMBER COMPANY, a Corporation,

Bankrupt.

Claim of MacDonald-Wiest Lumber Company.

United States of America,
Territory of Alaska,
Division No. One.—ss.

At Juneau, in said District of Alaska, Division No. One, on May 22d, 1919, came L. J. McDonald, of Ketchikan, Alaska, in said Division and District; and made oath and says: That the said Craig Lumber Company, a corporation, the corporation for whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of the said petition and still is justly and truly indebted to the said McDonald-Wiest Lumber Company, a corporation, in the sum of $27,871.50, with interest thereon, from December 20th, 1918, at 8% per annum amounting in all to $28,328.90; that the consideration of said debt is as follows:

"For logs sold and delivered to the said Craig Lumber Company, a bankrupt, during the period from January 1st, 1918, to December 20th, 1918."

And that no part of said debt has been paid and that there are no offsets nor counterclaims to the same; that said debt was due on December 20th, 1918, and is still due, and that no note has been received for such account nor any judgment rendered thereon, and that said McDonald-Wiest Lumber Company has not, nor has any person by its order or to its knowledge or belief for its use had or received any manner of security for said debt whatsoever, except that said company claims and holds a lien on logs and lumber as more particularly set out in the hereto attached copy of complaint, and that this deponent [6] is the treasurer of the said McDonald-Weist Lumber Company, and is duly authorized by said corporation to make this affidavit and proof for the said corporation and in its behalf.

L. J. MacDONALD.

Subscribed and sworn to before me this May 22d, 1919.

[Seal] H. L. FAULKNER,
Notary Public for Alaska.

My commission expires Nov. 14, 1922. [7]

In the United States District Court for Alaska, Division Number One, at Juneau.

IN BANKRUPTCY—No. 31

In the Matter of the CRAIG LUMBER COMPANY, a Corporation,

Bankrupt.

Objections of Trustee to Claim and Lien of MacDonald-Wiest Lumber Co., a Corporation.

Now comes E. L. Cobb, Trustee of the Estate of the above-named Craig Lumber Company, bankrupt, and objects to the proof of claim filed by the MacDonald-Wiest Lumber Company, a corporation of the State of Washington and prays that the same may not be allowed on the following grounds, to wit:

1. Said claim is not a claim provable in bankruptcy, for the reason that the said MacDonald-Wiest Lumber Company is a foreign corporation; that it never complied with the laws of Alaska concerning foreign corporations doing business in Alaska and at no time, and is not now authorized to do business in Alaska; that the said claim is founded upon and grows out of a contract for cutting logs in Alaska, which is the business of said company, which said contract was, and is, illegal and void.

2. Said MacDonald-Weist Lumber Company falsely asserts and alleges the consideration and amount of its claim in this: Said claim alleges the consideration to be for "For logs sold and delivered to the said Craig Lumber Company, a bankrupt, dur-

ing the period from January 1st, 1918 to December 20th, 1918."

That in truth and in fact the consideration for said claim was a contract made by and between the said bankrupt and said claimant in the year 1917, whereby the claimant undertook to cut, put in the water and boom logs belonging to the Craig Lumber Company and situated in Alaska at the rate of Ten ($10.00) Dollars per M. B. M.

That said contract was illegal and void for the reasons [8] set out in the first paragraph hereof, but if the same had been legal, there was not, and is not due thereon, the sum of $28,328.90 for that, the statement, "that no part of said debt has been paid" is untrue; that in part, the Craig Lumber Company, bankrupt, paid upon said contract, the sum of $12,660.30, and there was not due on said contract, (if the same had been legal) to exceed the sum of $19,527.30.

3. The claim of a lien upon logs and lumber belonging to the bankrupt estate made by the said MacDonald-Wiest Lumber Company, a corporation, to secure said claim is void, because (1) the said company is a foreign corporation, and had not at the time it was engaging in the business out of which said claim grew and at the time it attempted to fix its alleged lien by filing its claim of lien, complied with the laws of Alaska, so as to be legally authorized and empowered to do business in Alaska. (2) The claim of lien filed by the said MacDonald-Wiest Lumber Company is false and fraudulent in this: The said claim alleges that under its said contract with the

Craig Lumber Company, bankrupt, it had cut, felled and boomed 3,762,310 feet B. M. of logs, and had only been paid the sum of $9,748.50, while in truth and in fact the said MacDonald-Wiest Lumber Company had under its said contract cut, felled and boomed not to exceed 3,218,760 feet B. M. and had been paid the sum of $12,660.30. That no claim of lien for the amount due under said contract (if the same had been legal) was ever filed by the said MacDonald-Wiest Lumber Company.

4. The said MacDonald-Wiest Lumber Company, is a corporation, and during the year 1918, and prior thereto was engaged in the business of contracting on a large scale for the getting out and delivery of logs from the forests to lumber mills, which contracts it carried out and performed by the employment of large forces of laborers, but itself did no labor whatsoever, and is not "a person" to whom a lien is given on logs within the purview and meaning of the [9] statutes of Alaska (Compiled Laws, section No. 709), providing for liens upon logs.

5. The claimed lien upon 2,000,000 feet of lumber at the mill of the Craig Lumber Company, Bankrupt, is void, for the reasons aforesaid, and for the further reason, that said notice of lien fails to show that the MacDonald-Wiest Lumber Company performed any labor or rendered any service in the manufacture of said lumber, and in truth and in fact said company did not perform any labor or render and service in the manufacture of said lumber.

WHEREFORE the Trustee prays that the said claim of the MacDonald-Wiest Lumber Company be

disallowed and expunged, and for such other and orders as to the Court may seem proper.

J. H. COBB,
Attorney for the Trustee.

United States of America,
Territory of Alaska,—ss.

E. L. Cobb, being first duly sworn, on oath, deposes and says: I am the Trustee above named. The above and foregoing objections are true to the best of my knowledge and belief.

[Notarial Seal] E. L. COBB.

Subscribed and sworn to before me this the 2d day of August, 1919.

J. H. COBB,
Notary Public in and for Alaska.

My commission expires June 8, 1923.

Service of the above and foregoing objections of the Trustee admitted this the 2d day of August, 1919.

————————,
Attorney for the MacDonald-Wiest Lumber Company.

Filed August 2, 1920. H. B. Le Fevre, Referee in Bankruptcy, First Division of Alaska, Box 613, Juneau, Alaska.

Filed in the District Court, District of Alaska, First Division. Feb. 13, 1920. J. W. Bell, Clerk. By ————, Deputy. [10]

In the District Court of the United States for the District of Alaska, Division Number One, at Juneau.

IN BANKRUPTCY—No. 31.

In the Matter of CRAIG LUMBER COMPANY, a Corporation,

Bankrupt.

Order Expunging Claim of MacDonald-Wiest Logging Company.

At Juneau, in said District, on the 8th day of November, A. D. 1919.

Upon the evidence submitted to the Court upon the claim of the McDonald-Wiest Logging Company against said estate, upon hearing counsel thereon, it is ordered, that said claim be disallowed and expunged from the list of claims upon the trustee's record in said case.

H. B. LE FEVRE,

Referee in Bankruptcy, First Division of Alaska, Box 613, Juneau, Alaska. [11]

In the United States District Court for the Territory of Alaska, Division Number One, at Juneau.

IN BANKRUPTCY—No. 31.

In the Matter of the CRAIG LUMBER COMPANY, a Corporation,

Bankrupt.

Notice of Appeal.

To the Honorable H. B. LE FEVRE, Referee in Bankruptcy:

PLEASE TAKE NOTICE that the MacDonald-Wiest Logging Company appeals to the Honorable Robert W. Jennings, Judge of the District Court for the Territory of Alaska, Division Number One, at Juneau, from the decision of the Referee made and filed November 8th, 1919, disallowing and expunging from the list of claims upon the Trustee's record in said cause, the claim of the MacDonald-Wiest Logging Company, and respectfully requests that the record appertaining to said matter and said order be transmitted to the Honorable District Court at Juneau, Alaska, for review as provided by law.

Dated at Juneau this 21st day of November, 1919.

JOHN RUSTGARD,

Attorney for MacDonald-Weist Logging Company.

Copy received this 1st day of Dec., 1919.

J. H. COBB,

Atty. for Trustee Receiver.

Filed December 2, 1919. H. B. Le Fevre, Referee in Bankruptcy, First Division of Alaska, Box 613, Juneau, Alaska. [12]

In the District Court of the United States for the Territory of Alaska, Division No. 1, at Juneau.

IN BANKRUPTCY—No. 31.

In the Matter of the CRAIG LUMBER COMPANY, a Corporation,

Bankrupt.

Certificate of Referee.

I, H. B. Le Fevere, the Referee of this court in bankruptcy, do hereby certify that in the course of the proceedings in said cause before me the following questions arose pertinent to the said proceedings:

That the above-named bankrupt, the Craig Lumber Company, is a corporation duly organized and existing as such under and pursuant to the laws of the State of Washington, and authorized to do business in the Territory of Alaska.

That claimant, the MacDonald-Weist Logging Company, is a corporation organized and existing under the laws of the State of Washington.

That on or about the 2d day of January, 1918, the said MacDonald-Wiest Logging Company, a corporation as aforesaid, entered into a contract with the said bankrupt to cut sawlogs for the said bankrupt in the Territory of Alaska. That pursuant to said agreement the said MacDonald-Wiest Logging Company cut 3,762,310 feet, board measure, of sawlogs for which the said bankrupt agreed, pursuant to said contract aforementioned, to pay the said MacDonald-Wiest Logging Company at the rate of ten dollars per thousand feet, board measure. That the

MacDonald-Wiest Logging Company continued cutting logs under said contract until the 20th day of December, 1918, at which time the said MacDonald-Wiest Logging Company claimed there was due it for the cutting of said logs under said contract, the sum of $27,874.60.

That the said Craig Lumber Company was adjudged a bankrupt [13] by this court on the 19th day of March, 1919. That in due course of time the said MacDonald-Wiest Logging Company filed its claim against the estate of said bankrupt for the sum of $27,874.60, and claimed a lien for said sum upon certain logs and lumber belonging to the estate of said bankrupt. That the contract for the cutting of said logs above mentioned was entered into in the Territory of Alaska and was to be performed within the First Division of the Territory of Alaska.

The Trustee moved this Court that the claim of the MacDonald-Wiest Logging Company against the estate of the above-named bankrupt be stricken from the records and disallowed upon the ground that the MacDonald-Wiest Logging Company had not complied with the statutes of Alaska authorizing it as a foreign corporation to carry on business in the Territory of Alaska. Upon the hearing of said motion the following facts touching the authority of the MacDonald-Wiest Logging Company to carry on business in Alaska were submitted, to wit:

On December 12th, 1917, the MacDonald-Wiest Logging Company filed in the office of the clerk of the District Court for the First Division, the following papers, to wit:

(a) A certified copy of its Articles of Incorporation.

(b) Its written consent to be sued and the appointment of L. J. MacDonald as its agent.

(c) A document attached to document "b" filled out in the handwriting of L. J. MacDonald and which was in form an acceptance of the appointment, but same was never subscribed by said L. J. MacDonald.

(d) Annual report filed February 11th, 1919, sworn to by the President but not attested by the directors.

The MacDonald-Wiest Logging Company filed in the office of the Secretary of the Territory of Alaska the following documents at dates mentioned, to wit: [14]

(a) Copy of Articles of Incorporation, January 28th, 1919.

(b) Appointment of L. J. MacDonald as agent, and acceptance of appointment, filed January 28th, 1918.

(c) Annual statement filed February 16th, 1918.

(d) Annual statement filed February 27th, 1919.

The annual statement filed February 16th, 1918, was not verified by the President and Secretary of the MacDonald-Wiest Logging Company nor attested by the directors, and the annual statement filed February 27th, 1919, was not attested by a majority of the directors but was verified by the President and Secretary. No other papers or documents were ever filed by the MacDonald-Wiest Logging Company in either the office of the Secretary of the Territory or in the office of the clerk of the court for

the First Division, Territory of Alaska, but that the evidence shows that the MacDonald-Wiest Logging Company has paid the Territorial license tax for the years 1918 and 1919.

The questions of law have arisen under these facts as to whether or not the contract entered into between the MacDonald-Wiest Logging Company and the Craig Lumber Company is void and as such unenforceable in the courts of Alaska, and whether the MacDonald-Wiest Logging Company, not having complied with the laws of Alaska, as above stated, has any standing in a bankruptcy court.

This Referee has ruled on these questions; first, that by reason of the fact that the MacDonald-Wiest Logging Company has failed to comply with the laws of the Territory of Alaska authorizing a foreign corporation to do business therein, its contract for the cutting of logs above set out was absolutely void and could not be enforced in any of the courts of Alaska; and, second, that by reason [15] of its failure to properly qualify for doing business under the territorial laws of Alaska its said claim is not provable in bankruptcy and the said MacDonald-Wiest Logging Company has no standing in a bankruptcy court of the Territory of Alaska.

That said MacDonald-Wiest Logging Company has appealed to the Honorable District Court of this division from the said decision of this Referee and has asked for an adjudication of the questions by the Honorable District Court of the First Division of the Territory of Alaska sitting in bankruptcy, and

the said questions are certified to the Judge for his opinion thereon.

Dated at Juneau, Alaska, this 16th day of December, 1919.

H. B. LE FEVRE,
Referee in Bankruptcy.

O. K.—COBB.
JOHN RUSTGARD.

Filed in the District Court, District of Alaska, First Division. Dec. 16, 1919. J. W. Bell, Clerk. By ————, Deputy. [16]

In the District Court of the District of Alaska, Division Number One, at Juneau.

IN BANKRUPTCY—No. 31.

In the Matter of the CRAIG LUMBER COMPANY, a Corporation,

Bankrupt.

Opinion.

Oral opinion rendered reversing referee's action in disallowing and expunging from the list of claims upon the trustee's record in said cause, the claim of the MacDonald-Weist Logging Company.

(Done in open court February 2, 1920.)

(Entered Journal P, page 250, Feb. 2, 1920.)

ROBERT W. JENNINGS,
District Judge. [17]

In the District Court for the Territory of Alaska, Division Number One, at Juneau.

IN BANKRUPTCY—No. 31.

In the Matter of the CRAIG LUMBER COMPANY, a Corporation,

Bankrupt.

Order Reversing Decree of Referee.

This cause came duly on to be heard before the District Court for the Territory of Alaska, Honorable Robert W. Jennings presiding, at Juneau, Alaska, on the 16th day of December, 1919, upon an appeal by the MacDonald-Wiest Logging Company, a corporation, claimant, from an order and decree of H. B. Le Fevre, Referee in Bankruptcy, striking and expunging from the records in the above-entitled cause, the claim of the MacDonald-Wiest Logging Company, a corporation, upon the ground that the said MacDonald-Wiest Logging Company, a corporation, had not duly and properly qualified under the laws of Alaska to do business in the Territory of Alaska and that for that reason the contract between the MacDonald-Wiest Logging Company and the Craig Lumber Company, a corporation, bankrupt, and upon which the claim of the MacDonald-Wiest Logging Company, a corporation, is founded, was void and the claimant had no standing before any court in Alaska; John Rustgard, Esq., appearing for the MacDonald-Wiest Logging Company and John H. Cobb, Esq., appearing for E. L. Cobb, Trustee of Craig Lumber Company, a corporation, bank-

rupt; and the Court having heard the argument of counsel and duly considered the same,—

IT IS CONSIDERED AND ADJUDGED that the aforementioned order and decree of H. B. Le Fevre, as Referee in Bankruptcy, be, and the same is hereby reversed and the cause remanded for further [18] proceeding.

Done in open court at Juneau, Alaska, this 3d day of February, A. D. 1920.

ROBERT W. JENNINGS,
District Judge.

O. K.—COBB.

Entered Court Journal P, page 252.

Filed in the District Court, District of Alaska, First Division. Feb. 5, 1920. J. W. Bell, Clerk. By ————, Deputy. [19]

[Endorsed]: No. 3468. United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of the Craig Lumber Company, a Corporation, Bankrupt. E. L. Cobb, Trustee of the Estate of Craig Lumber Company, a Corporation, Bankrupt, Petitioner, vs. MacDonald-Wiest Logging Company, a Corporation, Respondent. Petition for Revision Under Section 24b of the Bankruptcy Act of Congress, Approved July 1, 1898, to Revise, in Matter of Law, a Certain Order of the United

States District Court for the Territory of Alaska, Division No. 1.

Filed March 22, 1920.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

IN BANKRUPTCY—No. 31.

In the Matter of the CRAIG LUMBER CO., a Corporation,

Bankrupt.

Notice of Filing and Hearing of Petition for Revision.

NOTICE OF PETITION FOR REVISION OF THE ORDER OF THE DISTRICT COURT REVERSING THE ORDER OF THE REFEREE, EXPUNGING AND DISALLOWING THE CLAIM OF THE McDONALD-WIEST LOGGING CO., A CORPORATION.

To John Rustgard, Attorney for the McDonald-Wiest Logging Co., a Corporation.

You will please take notice, that the undersigned has filed in the United States Circuit Court of Appeals for the Ninth Circuit, his petition for a revision of that certain order of the District Court of Alaska, Division Number One, dated February 3d, 1920, and

filed and entered February 5th, 1920, whereby the said District Court reversed the order of the Referee in Bankruptcy, expunging and disallowing the claim of the McDonald-Wiest Logging Co., a corporation, and remanding the matter for further proceedings.

You will also take notice that the undersigned will also call up for hearing the aforesaid petition at the regular May term of the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the courtroom in the City of San Francisco, California, on the 3d day of May, 1920, at ten o'clock in the morning of said day, or as soon thereafter as counsel can be heard.

You will also take notice that the errors of the District Court upon which the undersigned will rely in his petition for revision, and review of the said order of the District Court, which petition was heretofore filed in the said Circuit Court of Appeals is the error of holding and ruling that the Trustee in Bankruptcy was not competent to object to the claim of the McDonald-Wiest Lumber Co. on the ground that it was a foreign corporation doing business in Alaska, without first complying with the laws of Alaska, but such objection could only be made by the Craig Lumber Co., Bankrupt; and that the Craig Lumber Co. having failed to interpose such objection, the claim of the McDonald-Wiest Lumber Co. was provable in bankruptcy, not withstanding such claim grew out of a contract and business made and performed in Alaska by the McDonald-Wiest Lumber Co., a foreign corporation, without it having complied with the laws of Alaska, governing foreign

corporation, doing business in the territory, and reversing the order of the Referee in Bankruptcy expunging and disallowing said claim.

And as necessary for the consideration of said petition, the undersigned has designated the following portions of the record to be attached to said petition and printed:

1st. Claim of the McDonald-Weist Lumber Co.
2d. Objections by trustee to the claim of the McDonald-Weist Lumber Co.
3d. Order of the referee expunging claim of the McDonald-Weist Lumber Co.
4th. Notice of appeal of the McDonald-Weist Lumber Co.
5th. Certificate of the referee.
6th. Minute order reversing referee.
7th. Order reversing referee.

J. H. COBB,

Solicitor for E. L. Cobb, Trustee in Bankruptcy of the Craig Lumber Co., Bankrupt.

Copy of above notice together with what purports to be a copy of the petition for review received this 31st day of March, 1920.

JOHN RUSTGARD,

Attorney for the McDonald-Weist Lumber Co.

[Endorsed]: No. 3468. United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of the Craig Lumber Company, a Corporation, Bankrupt. E. L. Cobb, Trustee of the Estate of Craig Lumber Company, a Corporation, Bankrupt, Petitioner, vs. MacDonald-Wiest Logging Company, a Corporation, Respondent. Notice of Filing and Hearing of Petition for Revision. Filed Apr. 12, 1920. F. D. Monckton, Clerk.

NO. 3468

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

E. L. COBB, as Trustee of the Craig Lumber Co., a Corporation, Bankrupt. Petitioner.

vs.

McDONALD-WEIST LOGGING CO., a Corporation.

Respondent.

On Petition for Review of an order of the District Court for Alaska reversing an order of the Referee in Bankruptcy, expunging claim.

BRIEF FOR THE PETITIONER

J. H. COBB,
Attorney for Petitioner.

ALASKA DAILY CAPITAL, JOB DEPT.

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

E. L. COBB, as Trustee of the Craig Lumber Co., a Corporation, Bankrupt. Petitioner.

vs.

McDONALD-WEIST LOGGING CO., a Corporation. Respondent.

No. 3468

On Petition for Review of an order of the District Court for Alaska reversing an order of the Referee in Bankruptcy, expunging claim.

BRIEF FOR THE PETITIONER

J. H. COBB,
Attorney for Petitioner.

STATEMENT OF THE CASE

The McDonald-Weist Logging Co., a corporation of the State of Washington, filed its claim in Bankruptcy against the Bankrupt Estate for the sum of $27,884.60, and claiming a lien upon certain property in the hands of the Trustee. The Trustee objected to the claim on the grounds among others, that the claimant was a foreign corporation; that the

contract on which the claim was based and out of which it grew, was made in Alaska, and was to be performed in Alaska; and that at the time the contract was made, and while the claimant was engaged in business under it in Alaska, it had not complied with the Alaska laws governing foreign corporations doing business in the Territory, and the contract was void, and the claim under it was not a provable claim in Bankruptcy.

The Referee found the facts to be that the claimant was a corporation of the State of Washington. That the contract out of which the claim grew, was made in Alaska, January 2, 1918; that the McDonald-Weist Logging Co. filed in the Office of the Secretary of State for Alaska the following documents and no others, at the respective dates stated:

(a) Articles of Incorporation, January 28, 1918.

(b) Appointment of L. J. McDonald as agent and acceptance, January 28, 1918.

(c) Annual Statement, filed February 16, 1918.

(d) Annual Statement, filed February 27, 1919.

The Annual Statement filed February 16, 1918, was not verified by the President and Secretary of

the McDonald-Weist Logging Co., nor attested by the directors, and the Annual Statement filed February 27, 1919, was verified by the President and Secretary but not attested by the directors.

The following documents and no others, were filed by the McDonald-Weist Co. in the office of the Clerk of the District Court, at the dates respectively stated:

(a) Articles of Incorporation, December 12, 1917.

(b) Consent to be sued, and appointment of L. J. McDonald as agent, December 12, 1917.

(c) A document attached to (b) filed out in the handwriting of L. J. McDonald which was in form an acceptance of the appointment as agent, but the same was never subscribed, December 12, 1917.

(d) Annual Statement verified by the President, but not attested by the directors, filed February 11, 1919. (Rec. p. 14-17)

Upon these facts which were undisputed, the Referee held the contract void, and the claim not provable in Bankruptcy, and expunged the claim. (Rec. p. 12)

The McDonald-Weist Co. appealed to the Dis-

trict Court and the facts as found by the Referee were certified to that Court and the appeal was heard on said facts, as established. (Rec. p. 14-18).

The District Court reversed the ruling of the Referee and remanded the case for further proceedings.

In as much as the question here involved practically settles the controversy, the Trustee has petitioned this Court for a Revision, under the Bankruptcy Act.

The single question of law presented by the record is this: Can a foreign corporation doing business in Alaska, without first having complied with the local laws governing such corporations prove a claim in Bankruptcy for debt growing out of such business? The Referee held it could not; the District Judge held that it could.

The statutes of Alaska bearing upon the subject are Compiled Laws of Alaska, Sections 654, 655, 657, 658, (as amended by Chapter 20, Session Laws of Alaska 1917), and 660, which read as follows:

"Section. 654. All corporations or joint stock companies organized under the laws of the United States, or the laws of any state or territory of the United States, shall, before doing business within the District, file in the office of the Secretary of the District and in the office of the Clerk of the District Court for the division wherein they intend to carry

on business, a duly authenticated copy of their charter or articles of incorporation, and also a statement verified by the oath of the president and secretary of such corporation, and attested by a majority of its board of directors, showing—

"(1) The name of such corporation and the location of its principal office or place of business without the district; and, if it is to have any place of business or principal office within the district, the location thereof;

"(2) The amount of capital stock;

"(3) The amount of its capital stock actually paid in money;

"(4) The amount of its capital stock paid in any other way, and in what;

"(5) The amount of the assets of the corporation, and of what the assets consist, with the actual cash value thereof;

"(6) The liabilities of such corporation, and if any of its indebtedness is secured, how secured, and upon what property.

"Such corporation or joint stock company shall also file, at the same time and in the same offices, a certificate, under the seal of the corporation and the signature of its president, vice-president, or other acting head, and its secretary, if there be one, certi-

fying that the corporation has consented to be sued in the courts of the district upon all causes of actions arising against it in the district, and that service of process may be made upon some person, a resident of the district, whose name and place of residence shall be designated in such certificate, and such service, when so made upon such agent, shall be valid service on the corporation or company, and such agent shall reside at the principal place of business of such corporation or company in the district."

"Sec. 655. The written consent of the person so designated to act as such agent shall also be filed in like manner, and such designation shall remain in force until the filing in the same offices of a written revocation thereof, or of the consent, executed in like manner. A certified copy of the designation so filed, accompanied with a certificate that it has not been revoked, is presumptive evidence of the execution thereof, and conclusive evidence of the authority of the officer executing it."

"Sec. 657. If any such corporation or company shall attempt or commence to do business in the district without having first filed said statements, certificates, and consents required by this chapter, it shall forfeit the sum of twenty-five dollars for every day it shall so neglect to file the same; and every contract made by such corporation, or any agent or agents thereof, during the time it shall so neglect to

file such statements, certificates, or consents, shall be voidable at the election of the other party thereto. It shall be the duty of the United States attorney for the district to use for and recover, in the manner of the United States, the penalty above provided, and the same, when so recovered, shall be paid into the Treasury of the United States."

"Section 658. Every such foreign corporation or company shall annually and within sixty days (60), from the first day of January of each year make a report, which shall be in the same form and contain the same information as required in the statement mentioned in Section Six Hundred and Fifty-Four, Chapter Twenty-Three of the Compiled Laws of the Territory of Alaska, which report shall be filed in the office of the Secretary of the Territory of Alaska, and a duplicate thereof in the office of the Clerk of the District Court for the division of the Territory wherein the business of the corporation is carried on."

"Sec. 660. If any such corporation or company shall fail to comply with any of the provisions of this chapter, all its contracts with citizens of the district shall be void as to the corporation or company, and no court of the district, or of the United States, shall enforce the same in favor of the corporation or company so failing."

It will thus be seen that while the McDonald-Weist Co. had apparently intended to comply with the law, and taken some steps in that direction, it had wholly failed to do so, in this:

1st. In the Secretary's office,

(a) It failed to file articles of incorporation before making the contract.

(b) It failed to file its appointment of agent and his acceptance before the contract was made.

(c) The annual statements filed were not in compliance with the law and were in effect no statements.

2nd. In the clerk's office the company failed to comply with the law in the following:

(a) It filed no acceptance of agency.

(b) It filed no annual statement at all at the time, and during the period the contract was entered into, and was being performed.

A claim against a bankrupt estate, in favor of a foreign corporation, growing out of business done by it, without having first complied with the laws is void and not a provable claim in Bankruptcy.

I. Loveland on Bankruptcy 636.
Brandenburg on Bankruptcy Sec. 323.

In re Montello Brick Works, 163 Fed. 621
Affirmed 172 Fed. 311.
S. C. 174 Fed. 498.

Buffalo Ref. Mchn. Co. vs. Penn. H. & P. Co. 178 Fed. 696.

La Moine L. & T. Co. vs. Kesterson, 171 Fed. 980.

Pittsburg Con. Co. vs. W. S. B. Ry. Co. 154 Fed. 929, 11 L. R. A. (N. S.) 1145.

Tri-State Am. Co. vs. Forest Part, Etc. Co. 90, S. W. Rep. 1020.

In an oral opinion, rendered by the court below, the decision reversing the Referee was placed upon the ground that the Trustee could not interpose this defence, that such defence was personal to the Bankrupt, the other party to the contract, and as the Bankrupt had interposed no defense, the Trustee could not.

This we think was error, and a misconception of the powers and duties of Trustees in Bankruptcy.

He may object to claims.

Brandenburg on Bankruptcy Sec 653.
Atkins vs. Wilcox, 105 Fed. 595.

He takes all the rights and title of the bankrupt as well as the rights of creditors against adverse claimants to the state.

Brandenburg on Bankruptcy Sec. 724.

Besides under the plain provisions of Sec. 660 Com. L. of Alaska, *supra*, it was the plain duty of the Court to expunge the claim of the McDonald-Weist Co. on its own motion upon the facts being made known.

We respectively ask that the order of the District Court be reversed, and the order of the Referee expunging the claim be affirmed.

J. H. COBB,
Attorney for Petitioner.

NO. 3468

United States Circuit Court of Appeals

For the Ninth Circuit.

In the Matter of the CRAIG LUMBER COMPANY, a Corporation,

Bankrupt.

E. L. COBB, Trustee of the Estate of CRAIG LUMBER COMPANY, a Corporation, Bankrupt,

Petitioner.

vs.

MacDONALD-WIEST LOGGING COMPANY, a Corporation,

Respondent.

On Petition for Revision

Under Section 24b of the Bankruptcy Act of Congress, Approved July 1, 1898, to Revise, in Matter of Law, a Certain Order of the United States District Court for the Territory of Alaska, Division No. 1.

BRIEF FOR RESPONDENT

JOHN RUSTGARD,
Attorney for Respondent.

NO. 3468

United States Circuit Court of Appeals

For the Ninth Circuit.

In the Matter of the CRAIG LUMBER COMPANY, a Corporation,

Bankrupt.

E. L. COBB, Trustee of the Estate of CRAIG LUMBER COMPANY, a Corporation, Bankrupt,

Petitioner.

vs.

MacDONALD-WIEST LOGGING COMPANY, a Corporation,

Respondent.

BRIEF FOR RESPONDENT

STATEMENT OF FACTS.

In his statement of facts counsel for petitioner omits the very points upon which the lower court decided the case.

He also misstates the reasons which the lower

court assigned as the grounds for reversing the decision of the Referee.

The contract in question was between two citizens of the State of Washington. Both contracting parties were Washington corporations. (Tr. p. 14).

Section 660, for this reason, does not apply to this case. That section provides that, "If any such corporation or company shall fail to comply with any of the provisions of this chapter, all contracts with *citizens of the district* shall be void."

The Craig Lumber Company not being a citizen of the District (now Territory) of Alaska it cannot invoke this provision of the law.

Under these circumstances only section 657 is applicable. This section provides for a penalty of $25.00 per day for each day a foreign corporation does business in the territory without a compliance with the laws, and in addition, provides that its contracts shall not be void but only "*voidable at the election of the other party.*"

The learned court below held that section 657, and not section 660, applied to this case.

The learned court below also held that the delinquencies of respondent were merely technical and not substantial, and for that reason not material in a case of this kind.

ARGUMENT.

I.

CONTRACT ONLY VOIDABLE AND NOT VOID.

Statutes so highly penal as section 660 will be strictly construed. Petitioner will not be permitted to retain the benefits of respondent's labors and expenditures without paying for them, unless the language of the statute clearly and unequivocally enjoins such unjust course.

The penalty imposed by section 660 is expressly confined to contracts "with citizens of the district." No excuse is shown for extending the provisions of this section to contracts with others than those who are citizens of the district.

This is not a new subject to the courts. We quote from Ruling Case Law:

> "Even when a statute expressly provides that if a foreign corporation shall fail to comply with the requirements all its contracts with citizens of the state shall be void as to it, and shall not be enforced in its favor by the courts of the state, it has been held that the penal consequences of non-compliance, cannot be extended beyond the boundaries defined, and that the contract between foreign corporations and persons who *are not citizens* are not affected thereby." 12 R. C. L. 91.

To summarize:

Section 657 provides a penalty as follows:

"*Every* contract made by such corporations shall be voidable."

Section 660 provides:

"All its contracts *with citizens of the district* shall be void."

The natural interpretation of these provisions must be that every contract made by such a corporation shall be voidable unless it is made with a citizen of the district, in which event the contract shall be absolutely void.

> "It is a cardinal rule in the construction of statutes that effect is to be given, if possible, to every word, clause and sentence. It is the duty of the court, so far as practicable, to reconcile the different provisions, so as to make them consistent and harmonious, and to give a sensible and intelligent effect to each."

36 Cyc. 1128.

To hold that every contract made by the delinquent corporation, whether with citizens or not, shall be void, is to disregard and nullify the provisions of section 657. The only manner in which effect can be given to both sections is to draw the distinction which the language of the two sections clearly points

out, namely, a contract made by the delinquent corporaton is voidable except in cases where it is made with citizens of the district, in which latter event the contract is absolutely void and unenforcible.

The Craig Lumber Company is not a citizen of Alaska. It is a citizen of the State of Washington. It is a foreigner with a right of residence in the territory.

It may do business in the territory only by right of comity, and that comity has been extended upon condition.

A corporation is a citizen of the state in which it is incorporated and from which it holds its charter or right to exist, and though it is given the right to do business in another state, it may insist on its foreign citizenship whenever it is sued in a state in which it is only a resident.

10 Cyc, 150.

Obviously the Craig Lumber Company cannot claim the provisions of section 660 as against its fellow-citizen of the State of Washington.

Under the terms of section 657 by which the contract is merely "voidabel," the contracting party cannot sit by in silence and wait until the contract is fully executed, then retain the benefit of the contract and declare it void as far as the payment for that benefit is concrned.

It will be observed that respondent contracted to

furnish the labor in cutting saw logs for the bankrupt corporation. This contract was executed by respondent and the latter now claims a lien on those logs for that labor so performed. (Tr. p. 15.)

Under statutes like 657 the courts will not hold the contract void and unenforcible where the benefits are retained by the other party.

12 R. C. L. 91.

Fritz v. Palmer, 132 U. S. 282.

Johnson v. Brewing Co., 178 Fed., 513.

II.

No Violation of the Statutes.

It will be observed that respondent corporation did not flout the law but made an honest effort to comply. The delinquency is purely technical and unintentional. That is evidently the view taken by the United States Attorney, for no prosecutions were instituted by him under section 657.

Section 654 provides that a foreign corporation, to be entitled to do business in Alaska, must file certain documents in two spearate places in the territory. One set of the documents must be filed in the office of the Secretary of the District (now Territory), and one set in the office of the Clerk of the District Court.

In the First Division of Alaska the office of the Secretary of the Territory and of the Clerk of the District Court are in the same town, to-wit, in Juneau, Alaska.

On the 12th of December, 1917, respondent filed the required documents in the office of the Clerk of the District Court at Juneau.

During the months of January and February, 1918, it filed the required documents in the office of the Secretary of the Territory, also at Juneau.

But there were certain technical defects in these papers. The annual statement was not filed in the Clerk's office until February 11th, 1918.

The acceptance by L. J. MacDonald of his appointment as Agent was not subscribed by him, but it is admitted that his appointment was duly filed, and that on the same paper was written in Mr. MacDonald's handwriting an acceptance of that appointment, and that the defect in the document consists in the failure of Mr. MacDonald to attach his signature. However, L. J. MacDonald did sign the acceptance of his appoinment upon the documents filed in the office of the Secretary of the Territory.

It is respectfully submitted that the statute does not require the acceptance to the "subscribed." The acceptance was written by the agent himself, and that fact is admitted. It is immaterial whether or not he attached his signature *underneath.* If he stated "I, L. J. MacDonald, hereby accept the foregoing appointment," it is sufficient.

36 Cyc. 449.

It is also admitted that the annual statement filed February 16th, 1918, in the office of the Secre-

tary of the Territory, was not verified by both the President and the Secretary in conformity with the requirement of the statute, nor was it attested by the directors.

It will be observed, however, that the respondent corporation regularly each year paid its annual license fee of $15.00 to the Territory, as required by Chapter 11 of the Session Laws of the Territory of Alaska for the year 1913.

Under the circumstances it is respectfully submitted that the delinquencies are not such as to warrant the court in treating the corporation as an outlaw.

"Even though it is held that the statute of a state requiring foreign corporations to do and perform certain acts before commencinng to do business in such state is mandatory, and must be complied with before such corporation will be allowed to maintain an action to enforce contracts, yet it is usually held that a substantial compliance with a statute by a foreign corporation will entitle it to enforce its contracts."

12 R. C. L., 88.

Respectfully submitted,

JOHN RUSTGARD,
Attorney for Respondent.

No. 3468

United States
Circuit Court of Appeals
For the Ninth Circuit.

In the Matter of the CRAIG LUMBER COMPANY, a Corporation,

Bankrupt,

E. L. COBB, Trustee of the Estate of CRAIG LUMBER COMPANY, a Corporation, Bankrupt,

Petitioner,

vs.

MacDONALD-WIEST LOGGING COMPANY, a Corporation,

Respondent.

Respondent's Brief

MOTION TO DISMISS PETITION FOR REVISION AND BRIEF ON SAID MOTION AND ON SAID PETITION

Marsh Printing Co., Portland

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No. 3468

United States

Circuit Court of Appeals

For the Ninth Circuit.

In the Matter of the CRAIG LUMBER COMPANY, a Corporation,

Bankrupt,

E. L. COBB, Trustee of the Estate of CRAIG LUMBER COMPANY, a Corporation, Bankrupt,

Petitioner,

vs.

MacDONALD-WIEST LOGGING COMPANY, a Corporation,

Respondent.

Respondent's Brief

MOTION TO DISMISS PETITION FOR REVISION

Comes now the above named respondent, MacDonald-Wiest Logging Company, a corporation, by its attorneys, John Rustgaard, Thomas White and Arthur I. Moulton, and moves the court to dismiss the petition of E. L. Cobb, Trustee of the Estate of Craig Lumber Company, a corporation, bankrupt, upon the ground and for the reason that this

court has no jurisdiction to hear or determine the matters and things set forth in said petition for revision, and upon the ground and for the reason that the sole and exclusive remedy of said petitioner is by appeal under the provisions of section 25 of the Bankruptcy Act of the United States, and that inasmuch as more than ten days had elapsed after the making of the order herein sought to be revised at the time of the filing of the petition for revision aforesaid, this court is without jurisdiction to entertain said petition or to review or to revise said order.

Dated this 11th day of May, 1920.

JOHN RUSTGAARD,
THOMAS WHITE,
ARTHUR I. MOULTON,
Attorneys for Respondent.

STATE OF OREGON,
County of Multnomah—ss.

I, Arthur I. Moulton, one of attorneys for MacDonald-Wiest Logging Company, a corporation, in the within entitled matter, do hereby certify that the foregoing motion is made in good faith and not for the purpose of delay, and is in my opinion well founded in law.

ARTHUR I. MOULTON.

In the Matter of the CRAIG LUMBER COMPANY, a Corporation,

Bankrupt.

E. L. COBB, Trustee of the Estate of CRAIG LUMBER COMPANY, a Corporation, Bankrupt,

Petitioner,

vs.

MacDONALD-WIEST LOGGING COMPANY, a Corporation,

Respondent.

RESPONDENT'S BRIEF

On the Motion to Dismiss

This petition for revision is an attempt to proceed under the provisions of section 24-b of the Bankruptcy Act after the expiration of the time allowed for the taking of an appeal. The motion to dismiss is based upon the proposition that the order attacked by the petition to revise is an appealable order, within the provisions of section 25-a of the Bankruptcy Act. That section provides for the taking of appeals as in equity cases **inter alia** from a judgment allowing or rejecting a debt or claim of $500.00 or over. The order attacked by petition for revision is an order of the District Court of Alaska, Division No. 1, which in turn reverses an order of the Referee in Bankruptcy of that court, rejecting and disallowing the claim of MacDonald-Wiest Logging Company against the Craig Lumber

Company, bankrupt, for the sum of $27,871.50, with interest. The order disallowing the claim is in general terms and assigns no definite reason for the rejection. The reversal order is likewise general and assigns no definite reason for the reversal. The effect of the order of reversal is (stated on page 4 of the brief for the petitioner) to practically settle the controversy. In other words, the order is one allowing the claim, and it arises in a proceeding in bankruptcy, and more than $500.00 is involved.

Without elaboration, it is submitted that the rule of law stated by Mr. Justice Day, delivering the opinion of the United States Supreme Court, in the matter of Loving, 224 U. S. 183, 56th Law Ed. 725, conclusively determines this case. It was there held that an order allowing a claim and refusing to disallow it, although it was only opposed as a lien, was an appealable order under section 25-a. That the analogy between that case and this may not be overlooked, the court's attention is directed to the fact that the proceeding in the District Court was identical with the proceeding had here, with the exception that the order of the Referee allowed the lien claimed in the reported case but in the case at bar it was denied. In both cases, the order of the District Court overruled the objections and exceptions of the Trustee. Having determined that the order overruling the objections of the Trustee had the practical effect of an order allowing the claim and was appealable under section 25-a, the

Supreme Court then proceeded to definitely declare the rule that inasmuch as the order was an appealable one, it could not be reviewed after the expiration of the ten days allowed for appeal. Therefore, the thing that is attempted here has the definite disapproval of the United States Supreme Court, and we submit that the decision in that case settles and determines this case.

Upon the Merits of the Controversy

It is respectfully submitted that under the statute of Alaska, the objection that respondent had imperfectly qualified to do business in Alaska was available only at the election of the other party to the contract. We believe that the controlling provision of the statute of Alaska relating to the validity of contracts of this character is contained in section 657 of the Alaska Code, as amended by chapter 20 of the Session Laws of Alaska for 1917. Under this section the contract in question is not void, even if respondent had not complied with the law of Alaska, but is voidable merely and voidable only at the election of the other party to the contract. Therefore, the Trustee in Bankruptcy, who came into the matter after the contract had been in force and effect for more than a year, and the other party to it had exercised its election to treat the contract as valid and had permitted it to be fully performed by respondent, has no standing to question its validity.

With respect to the provisions of section 660, this may be said: They apply only to "contracts with citizens of the district." The Craig Lumber Company, like the respondent, is a Washington corporation and the contract with it was not a contract with a citizen of the District of Alaska. Not only this, but we believe a careful reading of all the provisions of the laws of Alaska, respecting the doing of business in the Territory, by private corporations, will lead to the conclusion that the provisions of section 657, as amended, are controlling and that such contracts are not in any event any more than "voidable at the election of the other party thereto."

Not only this, but there was a substantial compliance with the terms of the Alaskan law by respondent. Before it began any business in Alaska it did what its officers were advised was sufficient to entitle it to transact business. It made the contract the 2nd of January, 1918, and while the record furnished by the Trustee is inadequate in that respect, it is a fact that nothing was done in the way of performance of the contract for many months thereafter and no business was transacted under the contract until long after the respondent had filed all of the papers required of it under the Alaskan law. An examination of the claims of the Trustee shows that his objections are purely captious. In relation to the filings in the office of the Secretary, these were cured before any real busi-

ness was done. The words of the statute are that the contract in question, if not valid in the first instance, was only voidable at the election of the other party. Whatever defect existed was cured so early that the Craig Lumber Company would be estopped to claim that the contract was invalid after having accepted the benefits of performance of it, so long after it was cured. It is submitted that the annual statement, filed February 27, 1919, was in time and there was no default prior to that. The annual statement filed February 16, 1918, contained all that the law required.

All that was lacking in the filings with the Clerk of the District Court was the signature of L. J. MacDonald to the writing which he filed, accepting the appointment as agent. The statement filed here was in time, under a fair construction of the statute. The statement required by section 658 is patently a statement of the business of the corporation, and it was sufficient if it was filed within the first year the corporation did business.

In any event, there was a substantial compliance with the statute. Counsel on page 8 of the brief states that respondent "had apparently intended to comply with the law" and had taken some steps in that direction.

It is apparent that there was an honest attempt to comply with the law and enough was done that no harm could come to any person with whom the

corporation dealt. Its effort to comply with the law will be treated as a substantial compliance.

> Wash. Investment Ass'n. vs. Stanley, 38 Ore. 319; 63 Pac. 489; 84 Am. St. Rep. 793.
>
> Jordan et al. vs. Western Union Tel. Co., 76th Pac. 396.

In the case last cited the following language is used:

> "Aside from the fact that it was discretionary with the court to grant such permission at the time it was asked, we further note that there was a showing made by the telegraph company that it had in due time, under the terms of the law, made an effort to comply therewith in as full a degree as it was possible for it to do. If this attempt was technically insufficient, it would show an honest purpose and desire to comply with the law, and the court will not now reverse the action of the court below, because of the technical insufficiency of this compliance."

In the case of Washington Investment Association vs. Stanley, Supra, Mr. Justice Wolverton, one of the judges of this court, sitting as a member of the Supreme Court of the State of Oregon, referring to a Washington corporation, which was said to have transacted business in Oregon, and which had only six incorporators instead of ten, as required by the statute of Washington, used the following language:

> "The Association is at least a de facto corporation and may maintain suits and actions

> against those who have dealt with it to enforce their obligations and the state only can complain of its defective organization. 'When a body of men are acting as a corporation under cover of apparent organization, in pursuance of said charter or enabling act, their legal authority to act as a corporation cannot be questioned collaterally.' Taylor on Private Corporations, 4th Ed., Sec. 145. So that if there has been an apparent attempt to perfect an organization under the law and there has been user in pursuance of such attempt, the organization has acquired a de facto existence which will enable it to maintain its individuality against all attacks that may arise collaterally. Finnegan v. Noerenberg, 52 Minn. 239, 38 Am. St. Rep. 552."

It is submitted that the deficiencies claimed in the compliance of respondent with the Alaskan law are not matters of substance; that no one could have been injured by them, and no person but the most captious and hypertechnical would treat them as having any real effect upon the business transactions of the parties in interest, much less as having the effect of depriving respondent of the work and expense put forth by it in furnishing the logs and lumber which now constitute by far the greater portion of the estate of the bankrupt.

Respectfully submitted,

JOHN RUSTGAARD,
THOMAS WHITE,
ARTHUR I. MOULTON,
Attorneys for MacDonald-Wiest Logging Company.

No. 3469

30

United States

Circuit Court of Appeals

For the Ninth Circuit.

COLUMBIA AGRICULTURAL COMPANY, a Corporation,

Plaintiff in Error,

vs.

SEID PAK SING,

Defendant in Error,

and

SEID PAK SING,

Plaintiff in Error,

vs.

COLUMBIA AGRICULTURAL COMPANY, a Corporation,

Defendant in Error,

Transcript of Record.

Upon Writs of Error to the United States District Court of the District of Oregon.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

RUSSELL E. SEWALL and GUY C. H. CORLISS, Yeon Building, Portland, Oregon,
For the Columbia Agricultural Company.

ROBERT R. RANKIN, Wells Fargo Building, Portland, Oregon, and STERLING CARR, San Francisco, California,
For Seid Pak Sing.

Citation on Writ of Error—Seid Pak Sing.

United States of America,
District of Oregon,—ss.

To Seid Pak Sing, Defendant in Error, GREETING:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the District of Oregon, wherein the Columbia Agricultural Co., a corporation is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said District, this 20th day of February, in the year of our Lord, one thousand nine hundred and twenty.

R. S. BEAN,
District Judge.

Due and personal service of the above citation by delivery of a copy thereof is hereby admitted at Portland, Oregon, this 20th day of February, 1920.

ROBERT R. RANKIN,
Of Attorneys for Plaintiff. [1*]

[Endorsed]: No. 7997. In the District Court of the United States for the District of Oregon. Seid Pak Sing, Plaintiff, vs. Columbia Agricultural Co., a Corporation, Defendant. Citation. U. S. District Court, District of Oregon. Filed Feb. 20, 1920. G. H. Marsh, Clerk. [2]

Citation on Writ of Error—Columbia Agricultural Company.

United States of America,
District of Oregon,—ss.
To Columbia Agricultural Company, a Corporation, GREETING:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the District of Oregon, wherein Seid Pak Sing is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and

*Page-number appearing at foot of page of original certified Transcript of Record.

speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said District, this 24th day of February in the year of our Lord one thousand nine hundred and twenty.

R. S. BEAN
Judge.

State of Oregon,
County of Multnomah,—ss.

Due service of the within Citation is hereby admitted at Portland, Oregon, this 24th day of February, 1920.

RUSSELL E. SEWALL,
GUY C. H. CORLISS,
Attorneys for the Columbia Agricultural Company.

[Endorsed]: United States District Court, District of Oregon. Seid Pak Sing, Plaintiff, vs. Columbia Agricultural Company, a Corporation, Defendant. Citation on Writ of Error. U. S. District Court, District of Oregon. Filed Feb. 25, 1920. G. H. Marsh, Clerk. [3]

In the United States Circuit Court of Appeals for the Ninth District.

COLUMBIA AGRICULTURAL CO., a Corporation,

Plaintiff in Error,

vs.

SEID PAK SING,

Defendant in Error.

Writ of Error—Columbia Agricultural Company.

The United States of America,—ss.

The President of the United States of America, to the Judge of the District Court of the United States for the District of Oregon, GREETING:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the District Court before the Honorable Chas. E. Wolverton, one of you, between Seid Pak Sing, plaintiff and defendant in error, and Columbia Agricultural Co., defendant and Plaintiff in error, a manifest error hath happened to the great damage of the said plaintiff in error, as by complaint doth appear; and we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, and, in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, within thirty days from the date hereof, in said Circuit Court of Appeals to be then and there held; that the record and proceedings aforesaid, being then and there inspected, the said Circuit Court of Appeals may cause further to be [4] done therein to correct that error, what of right and according to the laws and customs of the United States of America should be done.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, this 20th day of February, 1920.

[Seal] G. H. MARSH,
Clerk of the District Court of the United States for the District of Oregon.

The foregoing Writ of Error was served on the District Court of the United States for the District of Oregon by depositing with me, as the clerk of said court, a true copy of the said writ on this 20th day of February, 1920.

G. H. MARSH,
Clerk, United States District Court, District of Oregon. [5]

[Endorsed]: In the United States Circuit Court of Appeals for the Ninth District. Columbia Agricultural Co., a Corporation, Plaintiff in Error, vs. Seid Pak Sing, Defendant in Error. Writ of Error. Filed February 20, 1920. G. H. Marsh, Clerk, United States District Court, District of Oregon. [6]

In the United States Circuit Court of Appeals for the Ninth Circuit.

SEID PAK SING,

Plaintiff in Error,

vs.

COLUMBIA AGRICULTURAL COMPANY, a Corporation,

Defendant in Error.

Writ of Error—Seid Pak Sing.

The United States of America,—ss.

The President of the United States of America, to the Judge of the District Court of the United States for the District of Oregon, GREETING:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the District Court before the Honorable Charles E. Wolverton, one of you, between Seid Pack Sing, plaintiff and plaintiff in error, and Columbia Agricultural Company, a corporation, defendant and defendant in error, a manifest error hath happened to the great damage of the said plaintiff in error, as by complaint doth appear; and we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, and, in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same,, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held; that the record and proceedings aforesaid, being then and there inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States of America should be done.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, this 25th day of February, 1920.

[Seal] G. H. MARSH,
Clerk of the District Court of the United States for the District of Oregon.

By ————————————,
Deputy.

The foregoing writ of error was served upon the District Court of the United States for the District of Oregon, by depositing a true copy thereof with me as the clerk of said Court on this 25th day of February, 1920.

G. H. MARSH,
Clerk, United States District Court, District of Oregon.

[Endorsed]: In the U. S. Circuit Court of Appeals for the Ninth Circuit. Seid Pack Sing, Plaintiff in Error, vs. Columbia Agricultural Company, Defendant in Error. Writ of Error. Filed February 25, 1920. G. H. Marsh, Clerk, United States District Court, District of Oregon. [7]

In the District Court of the United States for the District of Oregon.

November Term, 1918.

BE IT REMEMBERED, that on the 4th day of November, 1918, there was duly filed in the District Court of the United States for the District of Oregon

an amended complaint, in words and figures as follows, to wit: [8]

In the District Court of the United States for the District of Oregon.

SEID PAK SING,

Plaintiff,

vs.

COLUMBIA AGRICULTURAL COMPANY, a Corporation,

Defendant.

Amended Complaint.

Comes now the plaintiff above named, and for cause of action against the above-named defendant, complains and alleges:

I.

That plaintiff is and at and during all the times mentioned herein was a citizen of the Republic of China and a resident of the City and County of San Francisco, State of California.

II.

That defendant is and at and during all the times herein mentioned was a corporation organized and existing under and by virtue of the laws of the State of Oregon.

III.

That this action is a controversy between the above-mentioned and described citizens of different states and is a cause of a civil nature at law wherein the matter in controversy exceeds, exclusive of interest and costs, the sum of three thousand dollars as

more fully appears from the following allegations. [9]

IV.

That on or about the second day of March, 1917, plaintiff and defendant made and entered into a certain lease and agreement in writing, a copy of which is hereunto annexed and marked Exhibit "A," and which is hereby referred to, incorporated herein, and by this reference made a part of this paragraph of this complaint; that said lease was made for agricultural purposes and said plaintiff took and leased said property by the terms of said lease for the purpose of raising agricultural products on the properties therein described; that said land described in tract 1 and tract 2 of said lease is, and was, at the time of the making of said lease, reclaimed land, and land around which levees had been built by defendant and its predecessors in order to reclaim said property from water; that owing to the character of said property in tract 1 and 2 it was necessary for defendant to install or provide for the operation of pumps on said property to care for the surface water and the rainfall which would fall thereupon, and to pump and provide for the pumping of said rainfall and surface water from said premises in order to keep said premises in condition for agricultural purposes, and for the purposes for which said premises were leased as aforesaid by plaintiff; that defendant had installed or provided for the operation of and could secure the operation of pumps upon said premises for the purpose aforesaid, but failed to operate or provide for the operation of said pumps.

V.

That subsequent to the execution and delivery of said lease and within a reasonable time thereafter, plaintiff proceeded to the property described as "tract 1" in said lease, and selected from Midland Drainage District and the Magruder Drainage District the 400 acres referred to in said lease as tract 1, and indicated to [10] defendant said selection of land, but defendant failed and refuse to give to plaintiff possession of 400 acres of said tract 1, and delivered defendant possession of 200 acres of said tract.

VI.

That without waiving his right to demand the said 400 acres, and while still demanding said 400 acres, plaintiff entered into possession of the said 200 acres turned over to him by said defendant, and proceeded to plant 48 acres, and more, of the same to potatoes, and in the course of such planting caused said land to be prepared in a proper and efficient manner, and subsequent thereto cultivated and cared for said crop.

VII.

That subsequent thereto, and after the crop of said potatoes had fully matured and was ready for digging and harvesting, defendant permitted surface water and rainfall water to gather and flow upon said 48 acres of said 200 acres, to such an extent that said water drowned out the crop of potatoes growing upon said 48 acres; that said water so flooding said 48 acres did not come through a break in any levee surrounding said property, but was surface and rain water; that as aforesaid, the said property described

in said tract 1, of which plaintiff had possession, was at all of said times, equipped with pumps to keep said acreage clear of such surface and rain waters, and plaintiff at many times requested defendant to start said pumps and pump and keep said water from said 48 acres and to keep the said land drained of said surface and rain water, but that defendant wholly failed and refused so to do, and as a result thereof. [11] said surface and rain waters remained upon said 48 acres and plaintiff was unable to harvest the potatoes which he had planted upon said 48 acres, and which had matured thereon; that as a result of defendant's failure to keep said land drained, all of said potatoes growing upon said 48 acres were drowned out, and totally lost to plaintiff; that said 48 acres had an average of one hundred twenty (120) sacks of matured potatoes upon each of said 48 acres, and that said potatoes in the ground were worth the sum of One Dollar and 50/100 (1.50) per hundred lbs.; that by reason of said defendant's failure to keep said land free of said waters, and by reason of the loss of said 48 acres of potatoes as aforesaid, plaintiff was, and has been, damaged in the sum of Ten Thousand Eighty Dollars ($10,080.00); that for the purpose of harvesting said potatoes plaintiff had employed and ready for work upon the ground, 46 men, for the purpose of harvesting the potatoes in the said acreage in said tract No. 1; that said men were paid at the contract rate of $40.00 each per month, and board, which board was furnished by plaintiff for each of said men at a cost to plaintiff of 50¢ per day per man; that because of the flooding

of said acreage as aforesaid, and because defendant failed to pump the water from said acreage, said 46 men were unable to harvest said crop of potatoes so growing on said acreage so flooded, and from on or about the 15th day of December, 1917, up to and including the 30th day of December, 1917, said 46 men were unable to work or harvest said crop, and plaintiff paid said 46 men their full wages above specified, and furnished them board; that the sum paid by plaintiff to said 46 men for the said period from the 15th day of December, 1917, to the said 30th day of December, 1917, was $920.00 in wages, which is hereby alleged a reasonable wage for said 46 men for said period; plaintiff during said period furnished board to said 46 men at a cost to plaintiff of the sum of $345.00, which is hereby alleged to be a reasonable cost for the board of said 46 men for said [12] period.

AND, for a further, separate and distinct second cause of action against defendant above named, plaintiff above named alleges:

I.

Plaintiff refers to paragraphs I, II, III and IV of the first cause of action set forth herein, and incorporates said paragraphs and each of them as parts of this second cause of action.

That subsequent to the execution and delivery of said lease, and prior to the first day of January, 1918, and within the time required by said lease agreement, plaintiff proceeded to the property described in Tract 2 in said lease and selected from the Beaver Drainage District tract a certain 3,000 acres of land,

which is referred to in said lease, and indicated said selection to defendant lessor. That by the terms of said lease, defendant agreed to deliver possession of tract 2 described herein, to plaintiff at the time therein stated, and relying upon said representation and agreement of defendant, plaintiff employed laborers and purchased machinery and forwarded the same to said property for the purpose of preparing said tract 2 for farming; that defendant without right or cause, failed and refused, and still fails and refuses, to turn over and deliver to plaintiff, possession of said tract 2 at the time in said lease set forth, and plaintiff was required to return said laborers so employed, to their place of departure, and to reship said machinery so sent to said tract; that plaintiff expended and is damaged in the sum of Eight Hundred Ninety-five Dollars ($895.00) in sending such laborers and machinery to said tract 2 as aforesaid, and in returning the*n,* and it, when defendant as aforesaid refused to [13] deliver possession of said tract 2 to plaintiff.

WHEREFORE, plaintiff prays judgment against the defendant in the sum of $12,230.00, and for costs of suit.

ROBERT R. RANKIN,
STERLING CARR,
Attorneys for Plaintiff. [14]

State of California,
City and County of San Francisco,—ss.

Seid Pak Sing, being duly sworn, says that he is the plaintiff in the above-entitled action; that he has read the foregoing amended complaint, and that

the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

SEID PAK SING.

Subscribed and sworn to before me this 24th day of October, 1918.

[Seal] M. GERTRUDE JUDD,

Notary Public in and for the City and County of San Francisco, State of California.

My commission expires Oct. 17, 1920. [15]

Exhibit "A."

THIS INDENTURE, made and entered into this 2d day of March, 1917, at Portland, Oregon, by and between COLUMBIA AGRICULTURAL CO., a corporation duly incorporated, organized and existing under and by virtue of the State of Oregon, hereinafter called "Lessor," and SEID PAK SING, of San Francisco, California, hereinafter called "Lessee,"

WITNESSETH:

WHEREAS, Lessor is the owner of certain diked lands in what is known as Midland, Magruder and Beaver Drainage Districts, in the County of Columbia, and State of Oregon, which lands are protected from overflow by levees and a drainage system thereon, operated by said districts, sufficient for protection under ordinary circumstances; and

WHEREAS, said Lessee has examined said lands and desired to lease the same as hereinafter mentioned;

NOW, THEREFORE, for and in consideration of the payments of the rents and the performance of the covenants herein contained on the part of said lessee as hereinafter stated, said Lessor does hereby lease, demise and let unto said Lessee certain tracts of lands situated in the County of Columbia and State of Oregon, and more particularly described as follows:

Tract 1. A certain tract of Four Hundred (400) acres, situate, lying and being in Midland Drainage District and in Magruder Drainage District, of said County and State, and more particularly described in Exhibit "A" attached hereto and made a part hereof;

Tract 2. A certain tract of Three Thousand (3000) acres, situated, lying and being in Beaver Drainage District of said County and State, and more particularly described in Exhibit "B" attached hereto and made a part hereof;

Tract 3. A certain tract of about Fourteen Hundred or Fifteen Hundred (1400 or 1500) acres, being all of the rest and remainder of the lands without brush and trees in said Beaver Drainage District; it being understood that all of said lands are to be accepted in their present condition and are without brush or [16] trees, and are what are commonly known as the cleared lands, and being a portion of the lands owned by said Lessor in said Districts, and the same to be measured and set off by said Lessor unto said Lessee upon the execution of this lease, and more particularly described in Exhibit "C" attached hereto and made a part hereof.

TO HAVE AND TO HOLD the said Tract 1, or the 400 acres of land first above described, for the term beginning with the date hereof and ending on the 31st day of December, 1917, for the *agree* rentals of Thirty-six Hundred ($3600.00) Dollars, being at the rate of Nine Dollars ($9.00) per acre per annum, and payable as follows: Seven Hundred and Twenty ($720.00) Dollars thereof on August 1, 1917, and a like payment on the 1st day of September, October, November and December, thereafter, until said full amount of Thirty-six Hundred ($3600.00) Dollars is paid;

TO HAVE AND TO HOLD said Tract 2, or the 3000 acres of land above described, for the term beginning January 1, 1918, and ending December 31, 1921, for the agreed rentals of Twenty-seven Thousand ($27,000.00) Dollars per annum, being at the rate of *Nine* (*$9.00*) per acre per annum, and payable as follows: Six Thousand Seven Hundred and Fifty ($6750.00) Dollars thereof on the 1st day of September, October, November and December, 1918, and a like payment of Twenty-seven Thousand ($27,000.00) Dollars, payable at the same time as provided for the year 1918, in each and every year thereafter during the term of said lease;

TO HAVE AND TO HOLD said Tract 3, or the —— acres of land above described, and being all of the remainder of the so-called cleared land in said Beaver Drainage District, for the term beginning January 1, 1919, and ending December 31, 1921, for the agreed rentals of —— [17] Dollars ($——) per annum, the same being at the rate of Nine ($9.00)

Dollars per acre per annum, and payable as follows: one-fourth thereof on September 1, 1919, and a like amount on the 1st day of October, November, and December, of 1919, and a like payment of —— Dollars ($——), payable the same time as provided for the year 1919, in each and every year thereafter during the term of said lease.

IT IS EXPRESSLY UNDERSTOOD AND AGREED, however, that said Lessee shall not be called upon or required to pay any rental, other than hereinafter set forth, until he is given actual possession of said premises and every part thereof, and in a condition suitable and ready for the work to be performed thereon by said Lessee, and suitable for the purposes for which he is leasing said premises.

Said lessee, in consideration of the leasing of said premises and the agreements herein contained, does hereby expressly covenant to and with said Lessor, its successors and assigns, as follows:

1. That said Lessee will promptly pay to said Lessor the specified rentals above mentioned and in the manner aforesaid;

2. That Lessee will make no unlawful, improper or offensive use of the premises, and will at the expiration of said term or upon any sooner determination of this lease, without notice, quit and deliver up said premises and all future erections or additions to or upon the same, to said Lessor or those having its estate in the premises, peaceably, and quietly, and in as good order and condition (reasonable use and wear thereof, damage by fire or the elements alone

excepted) as the same now are or may be hereafter placed;

3. That Lessee will not suffer nor permit any strip or waste of the premises; [18]

4. That Lessee will not voluntarily or involuntarily or otherwise, assign, mortgage or pledge this lease nor permit it to be done by operation of law;

5. That Lessee will use and occupy said leased premises for general farming purposes, and will at all times cultivate the same in a first-class, husband-like manner, and will, during all of the term of this lease, keep said premises and every part thereof free from mechanics' liens and any and all liens and claims for labor or material that would in any way bind or become a charge upon said property, and agrees to protect Lessor against any loss or liability on account of any injuries to any persons or property by reason of Lessee's use and occupation of the premises;

6. That Lessee will, at all reasonable times, permit Lessor or those representing it to enter into the premises and examine the condition thereof and to make such construction and repairs as may be necessary to the levees and drainage system;

7. That Lessee will, at all times during said lease, at his own expense, keep the irrigation ditches on said lands clean and open; Lessor to keep main drainage canals open and clean.

8. That if Lessee holds over the term without the written consent of Lessor, such holding over shall be construed to be a tenancy from month, only.

Lessor guarantees to said Lessee the following:

1. That if during the term of this lease the levee should break and emit water upon the said leased lands, or if the water table should rise by reason thereof or from seepage, to such an extent as to injure or destroy the crops planted thereon, or on any part of said premises by Lessee, Lessor will reimburse said Lessee for the actual expense of the seeding and cultivating of said land to said time, not to exceed Twenty ($20,00) Dollars per acre, and said Lessee shall not be required to pay rental for that portion of the land on which crops may be so injured or destroyed, [19] as aforesaid, during the year in which said land is so flooded or such crops are so injured or destroyed;

2. To pump water off and to drain said lands so that the same will be at a depth of approximately four (4) feet below the surface of the land at seeding time, which depth of water is about one (1) foot above the zero mark of the district; and which is estimated at the proper depth for the best seeding of said land;

3. To furnish water at all times in sufficient quantities to irrigate the crops of Lessee as he may request the same, and, if necessary, to install intake boxes therefore;

4. To build a bridge or bridges across the drainage canal on the inside of the levee in the Beaver Drainage District, so as to afford sufficient access to said lands;

5. If found necessary for proper cultivation of the land, Lessor agrees to have made a topographical map for the benefit of Lessee;

6. That said lands contain no alkali in quantities to interfere with cultivation or growing of crops;

7. That it will construct a warehouse, twenty-five (25) feet by one hundred (100) feet, eight (8) foot *eve,* and wharf on levee for each five hundred (500) acre tract.

8. Lessee to have the use of any timber excepting large oak trees on said lands for firewood and domestic purposes;

9. To repair the house on Beaver Drainage District for the use of the manager of the Lessee;

10. To construct an additional main drainage canal in the Beaver Drainage District, so as to afford additional drainage of said lands; [20]

11. To pay the pumping charges, assessments and taxes which may be levied against said lands;

12. To provide and build a set of buildings upon each five hundred (500) acres of the lands of the Beaver Drainage District above described, at places to be hereinafter mutually agreed upon by the parties hereto, as follows:

(a) Bunk-house, two stories, thirty feet by sixty feet (30x60);

(b) Cook-house, twenty by sixty feet (20x60), with shed ten (10) feet along one side, with plank floor;

(c) Barn, with sufficient room to accommodate twenty (20) horses and feed for same;

(d) Company to furnish lumber and nails for bunks, tables, benches, toilets, and trough for watering horses; Chinamen to do work;

(e) Two pitcher hand-pumps;

(f) Sufficient brick and mortar for Lessee to con-

struct oven or open fireplace.

It is further understood and agreed that Lessee may have the privilege of leasing sufficient lands in the Westland Drainage District, in said County and State, belonging to said Lessor, which is now unimproved and unreclaimed (if during the life of this lease the same is improved and reclaimed), to make up six thousand (6000) acres of land, including the lands hereinbefore described, upon same terms.

It is further understood and agreed that Lessor owns about fifty-five hundred (5500) acres in Beaver Drainage District, and that a part of said lands is covered with brush and trees and is commonly known as the uncleared lands, and amounting to approximately eleven hundred (1100) acres, and that the Lessee may have the first right and privilege of leasing said uncleared lands, the terms and conditions of such leasing to be hereafter mutually agreed upon; it being further agreed [21] that said Lessee must exercise his right to lease said lands within two (2) years from the date thereof, and if arrangements are not made in writing between the parties hereto by said time, then Lessor may have the privilege of leasing or disposing of the same as it may deem advisable.

It is further understood and agreed that Lessee shall take possession of the lands described in Tract 2 above mentioned on or about August 1, 1917, and shall prepare the ground for the next year's crops, and shall not be required to pay any rent therefor until January 1, 1918, as above provided, unless he

shall crop the same; in which event he shall pay a reasonable charge therefor.

It is further understood and agreed that Lessee shall take possession of the lands described in Tract 3 above mentioned on or about August 1, 1918, and shall prepare the ground for the next years crops, and shall not be required to pay any rent therefor until January 1, 1919, as above provided, unless he shall crop the same, in which event he shall pay a reasonable charge therefor.

It is further agreed that Lessor shall measure and set off the acreage in the three different tracts above mentioned, and if Lessee is not satisfied with said measurement of the number of acres he shall cause the same to be surveyed at his own expense, and if there is any variance it is agreed that the parties hereto shall select an umpire whose decision as to the number of acres in said tract shall be final and binding upon the parties hereto. It is further agreed that the measurement of land shall commence at the base of levee and is not to include the main canals. Should Lessee, however, cultivate and crop the levee, he is to pay therefor at the rate of Nine Dollars ($9.00) per acre per annum at the times and in the manner above provided regarding the other lands.

It is further agreed that if any of the lands included [22] in this lease are so high by reason thereof that lessee cannot irrigate the same, or if any of the said lands are so low that irrigating or other water, would stand in pools and not naturally drain off, and lessee loses his crop on that account, Lessee shall not be required to pay any rent for said land,

and in consideration of the reduction of the rent waives any claim for damages for seed or labor or other expense connected therewith, the amount of said land, however, to be immediately measured and set off, and shall not to any other extent affect the provision of this lease.

It is further understood and agreed that Lessee may have a preference right of leasing the lands above described at the expiration of the present lease, providing Lessee has kept and performed all the terms and conditions of this lease upon his part to be kept and performed, to the satisfaction of Lessor, and will agree to pay the same rentals as any other persons who might be willing to rent said lands at said time, and providing further that Lessor at said time desires to make a further lease of said lands, and providing further that the same shall be fully settled and determined at least sixty (60) days prior to the termination of this lease.

It is further understood and agreed that said Lessee shall, upon the execution of this lease, pay to said Lessor the sum of Two Thousand ($2000.00) Dollars, and which sum shall be applied on the first installment of Six Thousand Seven Hundred and Fifty ($6,750.00) Dollars, which is the first installment of the rent due Lessor, and which is one-fourth (¼) of the rental of the year 1918, on the certain three thousand (3000) acres of the Beaver District, prvoided, however, that if during the year 1917, said Lessee should fail to get a crop satisfactory to him from the said four hundred (400) acres designated hereinabove as "Tract 1," he shall have the right,

privilege and option of canceling, [23] surrendering, and annulling this lease, upon paying to said Lessor the further sum of Sixteen Hundred ($1600.00) Dollars, providing also that he shall give to Lessor notice of said cancellation on or before December 1, 1917; in the event this lease is cancelled the said sum of Two Thousand ($2000.00) Dollars shall be applied as rental for the year 1917 on the said Tract 1, but in the event this lease is not so cancelled, the said sum of Two Thousand ($2000.00) Dollars shall apply as rental upon the said three thousand (3000) acres, as hereinbefore set forth, in which event the said Lessee shall, on the 1st day of December, 1917, pay to said Lessor an additional sum of Two Thousand ($2000.00) Dollars, which, together with the said sum of Sixteen Hundred ($1600.00) Dollars shall constitute the sum of Thirty-six Hundred (3600.00) Dollars as rental for the year 1917 upon the said four hundred (400) acres; it is distinctly understood and agreed that this paragraph is not to be taken as conflicting with any paragraph hereinbefore set forth in this lease to the effect that said Lessee shall pay the sum of Thirty-six Hundred ($3600.00) Dollars during the year 1917, in the stated amounts and at the stated intervals, for the said tract 1, and the provision herein contained is simply to apply for the year 1917, and to cover the contingency arising in the event that said Lessee cancels this lease in the manner herein provided; said Lessor shall pay interest on the said sum of Two Thousand ($2000.00) Dollars paid on the execution of this lease, at the rate of six (6%) per cent, per annum.

It is further understood and agreed that is during the year 1918, the said Lessee should fail to get a crop satisfactory to him from the said three thousand (3000) acres designated as Tract No. 2, he shall have the right, privilege and option of cancelling, surrendering and annulling this lease upon paying to said Lessor the rental due for the said three thousand [24] (3000) acres for the said year of 1918, provided that he shall give to Lessor notice of said cancellation on or before December 1, 1918.

It is further agreed that in case suit or action is instituted to collect any of the rentals or enforce any of the agreements or covenants of this lease, Lessee will pay to Lessor, in addition to the costs and disbursements, such additional sum as the Court may adjudge reasonable as attorney's fees therein.

PROVIDED ALWAYS, and these presents are upon this express condition, that if Lessee should be in arrears of rent for a period of ten (10) days, or if he does or shall neglect or fail to do or perform or observe any of the covenants contained in this lease on his part to be observed and performed, or if Lessee should be declared bankrupt or insolvent according to law, or if any assignment of his property should be made for the benefit of creditors, then and in any of said cases, Lessor, its legal representatives, successors or assigns, lawfully may, at its option, immediately or at any time thereafter and as often as such default may occur, without notice or demand, enter into and upon said premises or any part thereof in the name of the whole, and repossess the same as of its former estate, and expel Lessee and those

claiming under and through him, and remove their effects, (forcibly if necessary), without prejudice to any remedies which might otherwise be used for arrears of rent or preceding breach of covenant.

It is understood and agreed that the liabilities of both parties to this lease are subject to the Acts of God and the Public Enemy.

This lease shall, in all respects, extend to and be binding upon the successors, assigns, heirs, executors and administrators of the respective parties hereto; but this clause shall not operate any modification or limitation upon the prohibition [25] of assignments as hereinabove contained.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals, in duplicate, this, the day and year first above written.

COLUMBIA AGRICULTURAL CO.

[Corporate Seal]

By R. B. MAGRUDER, Mgr.

SEID PAK SING. [Seal]

Witnesses:

HORTENSE GARDNER.

STERLING CARR.

Acknowledged before Hortense Gardner, N. P., on Mar. 8, 1917. [26]

EXHIBIT "A."

TRACT 1: Those certain four hundred (400) acres which may hereafter be selected by the lessee from all of the properties now owned by the lessor, and free from selling contracts and leases, in the Midland Drainage District and in the Magruder

Drainage District; said selection to be made within a reasonable time after the date of this lease, and when so made to be indicated to said lessor.

EXHIBIT "B."

TRACT 2: That certain three thousand (3000) acres referred to in Tract 2 shall be selected by said lessee on or before the 1st day of January, 1918, and when so selected shall be indicated to said lessor, and may be made from any land now lying and being in the said Beaver Drainage District; no leases or selling contracts are now outstanding or will be made until after lessee has made its selections.

EXHIBIT "C."

TRACT 3: The certain tract of between fourteen hundred (1400) and fifteen hundred (1500) acres, being all of the rest and remainder of the lands without brush and trees in said Beaver Drainage District. [27]

State of Oregon,
County of ——, —ss.

Service admitted at Portland, Oregon, this fourth day of November, A. D. 1918.

GILTNER & SEWALL,
Of Attorneys for Defendant.

Filed November 4, 1918. G. H. Marsh, Clerk. [28]

AND AFTERWARDS, to wit, on the 25th day of February, 1919, there was duly filed in said court an answer, in words and figures as follows, to wit: [29]

In the District Court of the United States for the District of Oregon.

SEID PAK SING,

Plaintiff,

vs.

COLUMBIA AGRICULTURAL CO.

Defendant.

Answer.

Defendant, answering the amended complaint herein, admits, denies and alleges as follows:

I.

Defendant admits the allegations contained in paragraphs I, II and III of said complaint.

II.

Defendant denies each and every allegation contained in paragraph IV of said amended complaint, except defendant admits that on or about the 2d day of March, 1917, plaintiff and defendant entered into the lease and agreement referred to in said paragraph IV of said complaint, and further admits that Exhibit "A" attached to said complaint is a copy of the said lease and agreement, and also further admits that the land described in tracts 1 and 2 of said lease is and was, at the time of the making of said lease and agreement, reclaimed land and land

around which levees or dikes had been built in order to reclaim the said property from water, and alleges that a system of drainage, consisting of levees, dikes, canals, ditches, tide-gates and pumps, had been constructed and installed thereon to protect said lands from overflow, as hereinafter mentioned.

III.

The defendant, further answering said paragraph IV, alleges that the facts with respect to the obligation of defendant to pump water of any kind from said premises or to maintain or operate any drainage system [30] for the purpose of keeping said premises free from water, except as provided for in said lease, are as follows, to wit:

That prior to December 21, 1912, defendant was the owner of lands now comprising the Midland Drainage District of Columbia County, Oregon, according to the duly recorded map and plat thereof, which lands were low and swampy and subject to overflow from the waters of the Columbia River, and unfit for cultivation. That defendant, prior to said time, at great expense, constructed a large levee or dike around said Midland Drainage District lands, said levee having an average width at base of 60 feet, height of about 8 feet and width on top of about 12 feet; also constructed dams and dikes across the sloughs thereon, built tide-gates, and installed a pumping-plant and a general system of drainage, thereby reclaiming said lands and rendering the same fit for use and cultivation.

That thereafter and on December 21, 1912, when said system of drainage was constructed, said de-

fendant, for a valuable consideration, sold and conveyed said lands comprising said Midland Drainage District to R. B. Magruder, and on said date executed and delivered to him a deed of conveyance therefor which was duly executed, witnessed and acknowledged, and the same was thereafter and on December 31, 1912, filed for record in the office of the County Clerk of Columbia County, Oregon, and duly recorded at page 205 of Volume 18, Records of Deeds of said County and State. That said deed was made subject to certain reservations, restrictions and conditions running as covenants with said lands, wherein and whereby it was covenanted that said lands should be sold to purchasers who would covenant to associate themselves together and form an association with the other property owners therein, to be known as Midland Drainage District, and each bear their proportionate expenses of carrying on and maintaining said levees and drainage system and be governed by three trustees, to be elected by the property owners at a meeting to be called and held for said purpose, and to adopt by-laws for government and regulation of the District, and [31] to make assessments against land within the district for the necessary expenses of same.

That said deed also provided that the trustees, when elected and qualified, should receive, for and on behalf of all the owners of lands within the District, a conveyance of the pumping plant, tide gates and equipment for same.

That thereafter and on December 23, 1912, said R. B. Magruder, for a valuable consideration, con-

veyed all of said lands now known as said Midland Drainage District to this defendant by his deed of conveyance, duly executed, witnessed and acknowledged, entitling the same to be recorded, and the same was thereafter and on December 31, 1912, duly filed for record in the office of the County Clerk of said Columbia County and State of Oregon, and duly recorded at page 209 of Volume 18, Records of Deeds of said County and State, which deed expressly provided that the conveyance was subject to all of the reservations, restrictions and conditions set forth and mentioned in that certain deed made and executed by Columbia Agricultural Co. as grantor, under date of December 21, 1912, unto said R. B. Magruder as grantee, being the same conveyance above mentioned.

That thereafter this defendant caused said lands described in said deeds above mentioned to be surveyed and laid off into lots or tracts, and known as Midland Drainage District of Columbia County, Oregon, and caused a map or plat thereof to be made, together with the dedication thereof, the same being duly executed, witnessed and acknowledged so as to entitle it to be recorded, and the same was, on January 3, 1913, duly filed for record in the office of the County Clerk of said Columbia County and State of Oregon, and duly entered and recorded in the Plat Book therein.

That thereafter defendant sold and conveyed to divers persons several tracts of land within said Midland Drainage District, by deed and by contract, wherein and whereby said purchasers acquired the

said property and acreage within said district, subject to the said reservations, [32] restrictions and conditions set forth in said deed to R. B. Magruder above mentioned, and as herein alleged.

That on the 25th day of January, 1913, pursuant to notice to all of the owners of lands and contract holders in said Midland Drainage District, a meeting was duly and regularly held pursuant to and in accordance with the reservations and conditions specified in said deeds above mentioned, at which meeting all of the owners and contract owners were present and participated; and by mutual consent and agreement said Midland Drainage District of Columbia County, Oregon, was duly and properly organized, and by-laws, consisting of eighteen articles, were duly adopted by unanimous vote of all owners of lands in said district, as well as those owning a contract for the purchase of lands therein, which by-laws provided for the formation of said district, the qualifications for membership, the election of trustees, and granting to said trustees full authority to manage and control the district and the drainage system therein. That at said meeting there were duly elected three trustees, who qualified as such and continued to act as such until the next regular annual meeting, as provided by said by-laws; and that thereafter trustees, duly qualified, have acted in accordance with said by-laws. That said defendant thereafter transferred and delivered unto said trustees of said Midland Drainage District all district drainage canals, district roads, boat landings, rights, privileges and easements reserved to it

as set forth in said deed to R. B. Magruder above mentioned, the same being for the benefit of all property owners within said district. That since the election and qualification of said trustees for said district, on January 25, 1913, said defendant has had no supervision, control or management of said levees, canals, ditches, pump and/or drainage system of said district, or of any of the property thereof, except as a property owner and member of said district. That said trustees and property owners of said Midland District, since January 25, 1913, have had exclusive charge and control of said district and of the levees, dikes, ditches and [33] drainage system thereof and the pump and the pumping of water and the regulation of the height of the water within said district.

IV.

The defendant, further answering said paragraph IV, alleges: That prior to November 28, 1911, defendant was the owner of lands now comprising the Magruder Drainage District of Columbia County, Oregon, according to the duly recorded map and plat thereof, which lands were low and swampy and subject to overflow from the waters of the Columbia River, and unfit for cultivation. That defendant, about said time, at great expense, constructed a large levee or dike around said Magruder Drainage District lands, said levee having a substantial width at base of 60 feet, height of about 8 feet, and width on top of about 12 feet; also constructed dams and dikes across the sloughs thereon, built tide-gates, and in-

stalled a pumping plant and general system of drainage, thereby reclaiming said lands and rendering the same fit for use and cultivation.

That thereafter and on November 28, 1911, when said system of drainage was constructed, said defendant, for a valuable consideration, sold and conveyed said lands comprising said Magruder Drainage District to R. B. Magruder, and on said date executed and delivered to him a deed of conveyance therefor, which was duly executed, witnessed and acknowledged, and the same was thereafter and on November 29, 1911, duly filed for record in the office of the County Clerk of Columbia County, Oregon, and duly recorded at page 105 in Book 17, Records of Deeds of said County and State. That said deed was made subject to certain reservations, restrictions and conditions running as covenants with said lands, wherein and whereby it was covenanted that said lands should be sold to purchasers who should covenant to associate themselves together and form an association with the other property owners within said district, to be known as Magruder Drainage District, and each property owner to bear his proportionate share of expenses and carrying on and maintaining the levees and drainage system [34] thereon, and to be governed by three trustees to be elected by the property owners at a meeting to be called and held for such purpose, and to adopt by-laws for the government and regulation of the district, and to make assessments against the lands within the district to cover the necessary expenses

of the same. That such deed also provided that the said trustees, when elected and qualified, should receive, for and on behalf of all of the owners of lands within the district, a conveyance of all the main drainage canals, district roads and boat landings, and should take over, on behalf of all of the owners of lands within the district, the pumping plant, tide-gates and drainage system, and operate and maintain the same for the benefit of the district. That said deed further provided that at any tim thereafter, when said Magruder Drainage District shall be formed and organized, owners of more than one-half of acreage within said district may, if they so desired, petition the County Court of the State of Oregon for the County of Columbia, to form a drainage district under the laws of Oregon, or acts supplemental or amendatory thereof relating thereto, and when so formed the State laws shall take the place of the agreements contained in said deed regarding the operation and maintenance of the said district and the drainage system thereof.

That thereafter and on the 29th day of November, 1911, said R. B. Magruder, for a valuable consideration, conveyed all of said lands now known as said Magruder Drainage District, to this defendant by his deed of conveyance, which was duly executed, witnessed and acknowledged, entitling the same to be recorded, and the same was thereafter and on the 2d day of December, 1911, duly filed for record in the office of the County Clerk of said Columbia County and State of Oregon, and duly recorded at page 114, Book 17, Records of Deeds of said County

and State, which deed expressly provided that the said conveyance was subject to all of the reservations, restrictions and conditions set forth and mentioned in that certain deed made and executed under date of November 28, 1911, by the Columbia Agricultural Co. as grantor unto R. B. Magruder as grantee, being the same conveyance above mentioned. [35]

That thereafter said defendant caused said lands described in said deed above mentioned to be surveyed and laid into lots or tracts and known as Magruder Drainage District of Columbia County, Oregon, and caused a map or plat thereof to be made, together with a deed of dedication, the same being duly executed, witnessed and acknowledged so as to entitle it to be recorded, and the same was on July 3, 1912, duly filed for record in the office of the County Clerk of said Columbia County, State of Oregon, and was duly entered and recorded therein in the Book of Plats, page 27 thereof, for said purpose.

That defendant sold and conveyed to divers persons several tracts of land within said district, by deed and contract of sale, wherein and whereby it was provided that said purchasers acquired the said property and acreage within said district subject to the said reservation, restrictions and conditions set forth in said deed to R. B. Magruder above mentioned and as herein alleged.

That on the 2d day of November, 1912, at 2 P. M., pursuant to a notice to all of the owners of lands and contract holders in said Magruder Drainage District, a meeting was duly and regularly held, pursuant to and in accordance with the reservations and condi-

tions as specified in said deeds above mentioned, at which meeting all of the owners and contract owners were present and participated, and by mutual consent and agreement said Magruder Drainage District of Columbia County, Oregon, was duly and properly organized, and by-laws consisting of eighteen articles were duly adopted by the unanimous vote of all of the owners of the lands in said district, as well as those owning contracts for the lands therein, which by-laws provided for the formation of said district, the qualifications for membership, the election of trustees and the prescribing of the powers and the duties of said trustees to manage and control the district and the drainage system thereon. That at such meeting there were duly elected three trustees who qualified as such and continued to act as such until the next regular annual meeting as provided by said by laws, and that each succeeding [36] year trustees, duly qualified, have acted in accordance with such by-laws, until August 30, 1917. That on June 18, 1917, the property owners within the said Magruder Drainage District duly filed a petition in the office of the County Clerk of said Columbia County, Oregon, as provided by the drainage laws of the State of Oregon, praying for an order of the County Court of the State of Oregon for Columbia County to organize said lands comprising said district into a drainage district thereunder. That the time for hearing thereon was set for August 1, 1917, at which time, pursuant to due and legal notice thereof duly given, said Court of said Columbia County, Oregon, by order duly organized and created

said lands as a drainage district under the laws of the State of Oregon, and known as said Magruder Drainage District, Columbia County, Oregon. That thereafter and pursuant to notice the first meeting of the land owners of said district was held on August 30, 1917, at which time supervisors were duly elected as required by said law, and they and their successors in office have, since that time, controlled and operated said district for and on behalf of the property holders therein under the laws of the State of Oregon relating to drainage districts.

That defendant, on January 31, 1913, by a proper deed of conveyance, duly executed, witnessed and acknowledged so as to entitle it to be recorded, transferred and conveyed unto said trustees of said Magruder Drainage District all district canals, district roads and boat landings, also the pumping plant and tide-gates constructed and situated on said lands, and all interest in and to the same, the same being reserved to such defendant as set forth in said deed to R. B. Magruder, above mentioned, and such conveyance being for the benefit of all the property owners within said district; and that said conveyance was thereafter and on February 27, 1913, duly recorded at page 349, Book 18, Records of Deeds of said County and State.

That since the election and qualification of said trustees for said district, on November 2, 1912, said defendant has had no supervision, control or management of said levees, canals, ditches, pump or [37] drainage system of said district, or any of the

property thereof, except as a member and property owner within said drainage district. That said trustees and property owners of said Magruder Drainage District since November 2, 1912, and the supervisors of said district, since August 30, 1917, have had exclusive charge and control of said district and of the levees, dikes, ditches, pump and drainage system thereof, and of the pumping of the water and regulation of the height of the water within said district.

V.

Defendant, further answering said paragraph IV, alleges: That said defendant caused said lands to be so deeded, platted and dedicated as Midland Drainage District and Magruder Drainage District, respectively, and subject to all said conditions, covenants and restrictions in order to keep up, maintain and operate the levees, dikes and drainage system of said respective districts, for the mutual benefit and protection of all of the owners and purchasers of lands within said districts, and to provide for them a suitable plan for the formation and organization of drainage districts among the property owners therein, and impose the expense of the maintenance and operation thereof equally upon all of the lands within said respective districts benefited thereby, and to make the expenses a lien thereon and to the end that the land and contract owners within said districts should have the sole and exclusive charge of same, and to care for, maintain and operate the drainage system and property within said respective districts all as set forth in said sev-

eral conveyances and instruments above mentioned and alleged herein.

That prior to the entering into of the lease and agreement, Exhibit "A" of plaintiff's amended complaint herein, by and between this defendant and plaintiff, covering the property described in said complaint and answer herein, and prior to the time such lease was consummated, plaintiff herein had full knowledge and notice of each and all [38] of the above-mentioned instruments and the conditions of the same and of the execution and recordation thereof, and had full knowledge and notice of the intent and purpose thereof, and defendant alleges that said plaintiff had also examined said lands and premises and was thoroughly familiar therewith and had full knowledge and information thereof at the time of making of said lease, as to the situation and location of said leased premises and of the character of the soil, and the climatic conditions there prevailing, and the extent and condition of the ditches and dikes and pumping plant and drainage system thereof, and was familiar therewith and the general plan of drainage and the manner in which the same had been constructed, and that the same was being operated by the trustees for the property owners of said respective drainage districts as above mentioned.

VI.

Defendant, further answering said paragraph IV, alleges: That as the said plaintiff well knew, the only obligations which the defendant assumed with respect to keeping said premises free from water of

any kind were the obligations which it expressly assumed in and by the provisions of the said lease contract; and that if the said defendant had been required, as a condition of entering into the said contract, to assume the burden and duty of protecting the said premises from rainfall and surface water at all times of the year, without regard to the season of the year and without regard to the obligation of the plaintiff to harvest the crops raised upon said premises in the due and ordinary course of husbandry, said defendant would have refused to enter into said lease contract with plaintiff.

VII.

Defendant, answering the allegations contained in paragraph V, denies that defendant either failed or refused to give plaintiff possession of 400 acres of land of said tract 1, and denies that said defendant delivered to plaintiff possession of only 200 acres of said tract; and on the contrary, defendant alleges that, in conformation [39] with the provisions of said lease and agreement, said defendant measured and set off the acreage in said tract No. 1, and duly notified said plaintiff thereof, and that said acreage so measured and set off by said defendant to plaintiff contained more than 400 acres of cleared land, free from selling contracts and leases, and all situated in said Midland Drainage District and said Magruder Drainage District, and that said plaintiff, as lessee, was at liberty to and did select 400 acres of said land, so measured and set off to him by the defendant, as lessor, and did proceed to said property and select and take possession of same under said lease.

VIII.

Defendant denies each and every allegation set forth in paragraph VI of said amended complaint, except defendant admits that plaintiff planted a portion of said tract 1 to potatoes; and defendant denies that defendant has any knowledge or information sufficient to form a belief as to how many acres of said lands were planted by said plaintiff to potatoes.

IX.

Defendant answers paragraph VII of said amended complaint, and denies each and every allegation thereof.

Defendant, further answering plaintiff's amended complaint and for an affirmative defense herein, alleges:

I.

That the proximate cause of the damage, if any, to the plaintiff's potatoes grown upon said land, and the proximate cause of any damage sustained by plaintiff in connection with the planting, growing and harvesting of said potatoes was not the failure of the said defendant to perform its obligations to the plaintiff under the said lease contract or under the law, but was the negligent omission and failure of the said plaintiff to harvest said crop of potatoes in due course of husbandry and according to the custom of [40] persons raising crops of potatoes in the vicinity of the said land; that said crop of potatoes had matured and was ready to be harvested and dug by the plaintiff several weeks before the same was damaged by rainfall or surface water or at all, and that during all of said times the said plaintiff, by the exer-

cise of reasonable care and by following the custom of husbandry with respect to such crop followed in the vicinity of this land, could and should have harvested said crop of potatoes before the late rains of the year 1917 set in; and that the proximate cause of whatever damage was done to said potatoes by water was the negligent failure of said plaintiff to harvest said crop before the period of fall rains should arrive. That, as the said plaintiff well knew, the said crop of potatoes might be seriously damaged or lost by failing to harvest the same in season and by leaving the same in the ground until after the fall rains had set in, making it impossible, even by the use of drains and pumps, to free the said land of moisture so as to dig and harvest said potatoes. That the said fall of 1917 was exceptionally favorable to the harvesting of the said potatoes, because of the fact that the rainy season set in at a time much later than the usual time, and that the said rainy season did not set in so as to seriously affect the said land for the purpose of digging said potatoes until about the last of November, 1917.

Defendant, further answering said complaint and for a second affirmative defense, alleges:

I.

Defendant realleges all of the allegations contained in the first affirmative defense; and in addition thereto alleges that after the said rainy season set in, the rainfall was of such volume and the rainy days so frequent that no amount of pumping of water from said drainage district would have removed a sufficient amount of moisture from said land so as to

render it proacticable to dig said potatoes; but that, on the contrary, the condition of said [41] land became and continued, until after plaintiff's potatoes had been injured, so soaked with water which would not drain off into said drains so it could be pumped by the pumps upon said land, that the operation of said pump or pumps would have been wholly ineffectual to put the said land in such condition that plaintiff could dig said potatoes or put the land in such condition that the said potatoes would have been saved from damage.

Defendant, for answer to plaintiff's further, separate and distinct second cause of action in said amended complaint, admits, denies and alleges as follows:

I.

Defendant admits the allegations contained in paragraph I thereof referring to paragraphs I, II and III of the first cause of action in said amended complaint.

II.

Defendant denies each and every allegation of paragraph IV of the first cause of action incorporated in said paragraph I, except defendant admits that on or about the 2d day of March, 1917, plaintiff and defendant entered into the lease and agreement referred to in said paragraph IV of said complaint; and further admits that Exhibit "A" attached to the said complaint is a copy of the same; and also further admits that the land described in tract 1 and tract 2 of said lease is and was, at the time of the making of said lease and agreement, reclaimed land and land

around which levees or dikes had been built in order to reclaim the said property from water; and alleges that a system of drainage, consisting of levees, dikes, canals, ditches, tide-gates and pumps, had been constructed and installed thereon to protect said lands from overflow.

III.

Defendant denies each and every allegation contained in paragraph II of said second cause of action. [42]

Defendant, for an affirmative defense to plaintiff's second cause of action, alleges:

I.

That in the month of November, 1917, said plaintiff notified defendant that he was unable to finance so large a deal as the carrying on of said lease for 3,000 acres during the season of 1918, and expressed a desire to open up negotiations for the leasing of a smaller body of land; and that thereupon and in the month of December, 1917, the parties, plaintiff and defendant, by mutual consent, abandoned and rescinded the said lease with respect to said 3,000 acres of land, and thereafter said plaintiff opened up negotiations with the defendant, looking to the making of a new contract for a smaller number of acres in place of the contract so abandoned and rescinded, but that no such contract between the parties was ever made; and that all of the things done by the plaintiff, set forth in paragraph II of the second cause of action, were, if done at all, by the said plaintiff, done by him with full knowledge that they were not being done under the terms of the said contract

so rescinded as aforesaid, but were being done only with the expectation on his part that he would be able to make a new contract with defendant for a smaller number of acres for said season of 1918.

Defendant, for a further and separate answer and as a setoff and counterclaim, alleges as follows:

I.

That defendant is and at all the times herein mentioned was a corporation organized and existing under and by virtue of the laws of the State of Oregon.

II.

That plaintiff is and at all of the times mentioned herein was a citizen of the Republic of China, and a resident of the city [43] and county of San Francisco, State of California.

III.

That this action is a controversy between the above mentioned and described citizens of different States, and is a cause of a civil nature at law, wherein the matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000.00, as more particularly set forth in the complaint and answer herein.

IV.

That on or about the 2d day of March, 1917, at Portland, Oregon, the defendant, as lessor, and the plaintiff as lessee, made and entered into a certain agreement and lease in writing, wherein defendant leased to the plaintiff certain lands in Midland Drainage District and Magruder Drainage District, in Columbia County, Oregon, upon certain terms and conditions and for certain specified rentals, all as is

more particularly set forth in said lease and agreement, a copy of which is attached to and made a part of plaintiff's complaint, marked Exhibit "A," which exhibit is hereby specially referred to and made a part hereof the same as if fully incorporated herein.

V.

That under and pursuant to said lease and agreement said defendant duly measured and set off to plaintiff more than 400 acres of land, as follows: Tracts 29, 30, 31, 34, 35, 37, 38, 39, 45, 46, 48, 49, 52, 53, 54, 66, 67, 79 and 80 in said Midland Drainage District, containing 351.45 acres, and Tracts 7, 8, 9, 10, 11, 15, 16, 17, 18 and 20 in said Magruder Drainage District, containing 145 acres, all as more particularly set forth in the recorded maps and plats thereof, in the office of the County Clerk of said Columbia County, State of Oregon, and being in all 496.45 acres and all of the cleared land owned by said defendant and free from selling contracts and leases in said Districts.

VI.

That thereafter plaintiff had the opportunity to select, and did select and enter into possession of 400 acres of [44] said lands, being tract 1 of said lease, at the agreed rental of $3,600.00 for the term beginning with the date of said lease and ending on the 31st day of December, 1917, payable as follows: $720.00 thereof on August 1, 1917, and a like payment on the 1st day of September, October, November and December, thereafter, until said full amount of $3,600.00 is paid,

VII.

That plaintiff occupied said lands, being Tract No. 1 of said lease, during all of said term, but paid no part of said rentals as specified in said lease, excepting the sum of $2,000.00, which sum of $2,000.00 the plaintiff had deposited with the defendant on account of rentals for the year 1918 for tract 2 under said lease, as therein mentioned. That in Decemebr, 1917, said lease regarding said lands known as Tract 2 was cancelled and rescinded by mutual consent of the plaintiff and defendant, and thereupon defendant applied and credited said sum of $2,000.00 upon the rentals above mentioned; that the balance of $1,600.00 is now and ever since December 1, 1917, has been due and owing from the said plaintiff to the defendant.

Defendant, for a further separate and second answer and as a further setoff and counterclaim to plaintiff's amended complaint, alleges as follows:

I.

Defendant refers to paragraphs I, II and III of its first separate answer and counterclaim to plaintiff's amended complaint, set forth herein, and incorporates said paragraphs and each of them as parts of this second answer and counterclaims.

II.

That plaintiff is indebted to defendant for work, labor, services performed and goods, wares and merchandise furnished, sold and delivered, and cash advanced by said defendant to the plaintiff, all [45] as more particularly set forth in a certain bill of items thereof, in writing, hereto annexed and marked

Exhibit "A" and hereby specially referred to and made a part of this paragraph of this separate answer, as if fully incorporated herein, all being done and performed, furnished, sold and delivered, and paid by said defendant for and to said plaintiff, at the special instance and request of the plaintiff, and between July 31, 1917, and January 2, 1918, at Clatskanie, Oregon, amounting to the sum of $1,558.40.

III.

That no part of said sum has been paid, and the whole amount of $1,558.40 is now due and owing from plaintiff to this defendant.

WHEREFORE, defendant prays for judgment against said plaintiff in the sum of $1,600.00, together with interest thereon at the rate of 6% per annum from the 1st day of December, 1917, until paid; and for the further sum of $1,558.40, together with interest thereon from January 2, 1918, until paid; and that said amended complaint of the plaintiff herein be dismissed, and for its costs and disbursements herein.

RUSSELL E. SEWALL and
GUY C. H. CORLISS,
Attorneys for Defendant. [46]

State of Oregon,
County of Multnomah,—ss.

I, Russell E. Sewall, being first duly sworn, depose and say: That I am one of the attorneys for the Columbia Agricultural Co., a corporation, the defendant herein; that the material allegations of said answer are within my personal knowledge, and I make this verification for the reason that there is

no officer of the corporation now within the county capable of making the affidavit; and that said answer is true as I verily believe.

RUSSELL E. SEWALL.

Subscribed and sworn to before me this 24th day of February, 1919.

[Seal] FRANK J. STREIBIG, Jr.
Notary Public for Oregon.

My commission expires July 12, 1922. [47]

Exhibit "A."

BILL OF ITEMS.

1917.				
July 31.	M. W. Hdwe. Co. (Lamps)....			$ 6.65
July 31.	Operating Caterpillar:			
	Labor	$141.45		
	Fuel oil	122.20		
	Oil and waste	21.96		
	Repairs and replacements	9.23		
	Miscellaneous expense.	8.94		
		$303.78		
	10% additional on above	30.38		334.16
31.	Iron Drum (Gas).....			8.00
Aug. 31.	Freight on Fish			.70
31.	Iron Drum 51048 (Associated Oil Co.)			8.00
31.	Tichenor Lumber Company.....			.74
Sept. 24	Cash advanced by R. B. Magruder			60.00

30.	Cash advanced by R. B. Magruder	64.60
Oct. 31.	Freight on sacks	1.20
31.	Iron Drum 7502 (Associated Oil Co.)	8.00
31.	1 M Sacks and Twine (Ames, Harris & Neville).....	135.40
31.	Freight on sacks and twine.....	6.95
Nov. 30.	Stoves, etc.....	24.00
Dec. 31.	Cash advanced John Niemi on account of power boat	400.00
31.	Cash advanced on account	200.00
1918.		
Jan. 2.	Cash advanced account John Niemi boat	300.00
		$1558.40

[48]

State of Oregon,
County of Multnomah,—ss.

Due service of the within answer and the receipt of a copy thereof duly prepared and certified by Russel E. Sewall, one of the attorneys for defendant, is hereby admitted at the city of Portland, in said County and State, this 25th day of February, 1919.

ROBERT R. RANKIN,
J. F. R.,
Attorneys for Plaintiff.

Filed February 25, 1919. G. H. Marsh, Clerk.

[49]

AND AFTERWARDS, to wit, on the 4th day of June, 1919, there was duly filed in said court a reply, in words and figures as follows, to wit: [50]

In the District Court of the United States for the District of Oregon.

SEID PAK SING,

Plaintiff,

vs.

COLUMBIA AGRICULTURAL COMPANY, a Corporation,

Defendant.

Reply.

Comes now plaintiff above named and for reply to the answer of defendants herein, ADMITS, DENIES and ALLEGES as follows:

I.

DENIES paragraph III on pages 1 to 5, inclusive, of said answer and each and every allegation therein contained, except plaintiff ADMITS that the lands of the defendant in the Midland Drainage District were low and swampy and subject to overflow and unfit for cultivation, and ADMITS that defendant installed a pumping plant and a general system of drainage, and ALLEGES that defendant had the controlling interest in the management of said drainage district and in the levees, canals, ditches, pumps and drainage system.

II.

DENIES paragraph IV on pages 5 to 9, inclusive, and each and every allegation therein contained, except plaintiff ADMITS the lands of defendant in the Magruder District were low, swampy and subject to overflow and unfit for cultivation, and ADMITS that defendant installed a pumping plant and general system of drainage, and ALLEGES that defendant has the controlling interest in the management of the said drainage district and in the levees, canals, ditches, pumps and drainage system.

III.

DENIES paragraph V on pages 9 and 10, and each and every allegation therein contained.

IV.

DENIES paragraph VI on page 10 and each and every allegation therein contained. [50½]

V.

DENIES paragraph VII on pages 10 and 11, and each and every allegation therein contained other than as alleged in plaintiff's complaint.

VI.

DENIES paragraph I on pages 11 and 12 and each and every allegation therein contained.

VII.

DENIES paragraph I on pages 12 and 13 of defendant's second affirmative defense, and each and every allegation therein contained.

VIII.

DENIES paragraph I on page 14 of defendant's affirmative defense to plaintiff's second cause of action, and each and every allegation therein contained.

IX.

DENIES paragraphs IV, V, VI and VII on pages 14, 15 and 16 of said answer in defendant's further and separate answer and setoff and counterclaim, and each and every allegation in said paragraphs contained.

X.

DENIES paragraphs II and III on pages 16 and 17 of defendant's further, separate and second answer as a further setoff and counterclaim, and each and every allegation therein contained.

ROBERT R. RANKIN,
Of Attorneys for Plaintiff.

State of Oregon,
County of Multnomah,—ss.

I, Robert R. Rankin, being first duly sworn, depose and say:

That I am one of the attorneys for the plaintiff herein; [51] that I have read the foregoing reply and believe the allegations therein contained are true, and that I make this verification for the plaintiff, who is not in the State of Oregon, but now resides in San Francisco, California.

ROBERT R. RANKIN.

Subscribed and sworn to before me this 4th day of June, 1919.

[Seal] W. A. ROBBINS,
Notary Public for Oregon.

My commission expires July 20, 1920.

State of Oregon,
County of Multnomah,—ss.

Service by copy admitted at Portland, Ore., June 4th, 1919.

RUSSELL E. SEWALL,
Attorney for Defendant.

Filed June 4, 1919. G. H. Marsh, Clerk. [52]

AND AFTERWARD, to wit, on Monday, the 13th day of October, 1919, the same being the 85th judicial day of the regular July term of said court—Present, the Honorable CHARLES E. WOLVERTON, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [53]

In the District Court of the United States for the District of Oregon.

No. 7997.

October 13, 1919.

SEID PACK SING

vs.

COLUMBIA AGRICULTURAL COMPANY.

Minutes of Court—October 13, 1919—Trial.

Now, at this day, come the plaintiff by Mr. Robert R. Rankin and Mr. Sterling Carr, of counsel, and the defendant by Mr. Russell E. Sewall and Mr. Guy

C. H. Corliss, of counsel, whereupon, upon motion of said plaintiff,—

IT IS ORDERED that he be and he is hereby allowed to amend the complaint herein by interlineation, and upon motion of said defendant, IT IS ORDERED that it be and it is hereby allowed to amend its answer herein by interlineation.

Whereupon, this being the day set for the trial of this cause, now come the following named jurors to try the issues joined, viz: James Humphrey, Joe Ledgerwood, H. H. Wessel, John Busenbark, Elijah McVey, J. L. Hughes, Delbert Brown, A. A. Spangler, Chas. L. Lillie, Edgar E. Dickey, W. E. Morris and Thomas Roberts, twelve good and lawful men of the district, who being accepted by both parties and being duly impaneled and sworn, proceed to hear the evidence adduced. And the said jury having heard the evidence adduced and the hour of adjournment having arrived, the further trial of this cause is continued to to-morrow, Tuesday, October 14, 1919. [54]

AND AFTERWARDS, to wit, on Tuesday, the 21st day of October, 1919, the same being the 92d judicial day of the regular July term of said court —Present, the Honorable CHARLES E. WOLVERTON, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [55]

In the District Court of the United States for the District of Oregon.

No. 7997.

October 21, 1919.

SEID PAK SING

vs.

COLUMBIA AGRICULTURAL COMPANY.

Minutes of Court—October 21, 1919—Trial (Continued).

Now at this day come the parties hereto by their counsel as of yesterday, whereupon the jury impaneled herein being present and answering to their names the trial of this cause is resumed. And the said jury having heard the evidence adduced, the arguments of counsel, and the charge of the Court, retire in charge of a proper sworn officer to consider of their verdict. And thereafter the said jury return to the court the following verdict, to wit:

> "We, the jury duly impaneled to try the above-entitled cause, do find for the plaintiff and fix his damages at the sum of two thousand twenty-four and 93/100 dollars.
>
> THOMAS ROBERTS,
> Foreman."

Which verdict is received by the Court and ordered to be filed. Whereupon, upon motion of said plaintiff for judgment upon said verdict—

IT IS ADJUDGED that the plaintiff above named do have and recover of and from the defendant here-

in the sum of $2,024.93, and his costs and disbursements herein taxed at $309.54, and that execution issue therefor. [56]

AND AFTERWARDS, to wit, on the 21st day of October, 1919, there was duly filed in said court a verdict, in words and figures as follows, to wit: [57]

In the District Court of the United States for the District of Oregon.

SEID PAK SING,

Plaintiff,

vs.

COLUMBIA AGRICULTURAL COMPANY, a Corporation.

Defendant.

Verdict.

We, the jury duly impaneled to try the above-entitled cause, do find for the plaintiff and fix his damages at the sum of Two Thousand Twenty-four and Ninety-three Hundredths Dollars.

THOMAS ROBERTS,
Foreman.

Filed October 21, 1919. G. H. Marsh, Clerk. [58]

AND AFTERWARDS, to wit, on the 19th day of February, 1920, there was duly filed in said court a Bill of Exceptions, in words and figures as follows, to wit: [59]

In the District Court of the United States for the District of Oregon.

7997.

SEID PAK SING,

Plaintiff,

vs.

COLUMBIA AGRICULTURAL CO., a Corporation,

Defendant.

Bill of Exceptions.

BE IT REMEMBERED, that heretofore and upon the —— day of October, A. D. 1919, the above-entitled cause came on duly and regularly for hearing in the above-entitled court before Honorable Charles E. Wolverton, Judge of the said court, and a jury duly impaneled to try this case. The plaintiff herein was represented by Sterling Carr and Robert R. Rankin; and the defendant herein by Russell E. Sewall and Guy C. H. Corliss. Thereupon the following proceedings were had:

Counsel for the respective parties made their opening statements to the jury, and thereafter the following evidence was offered and received, and the following proceedings had:

Testimony of R. B. Magruder, for Plaintiff.

R. B. MAGRUDER, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows, on direct examination:

I live at Clatskanie, Oregon, and have lived there for about ten years. I have been farming there six or eight years, general farming on reclaimed land. I was stockholder and manager of the defendant, but not an officer. I assisted in organizing the defendant corporation in 1908. I am not with the company now. Left it March 28, 1918. Later on I filed an action against the defendant, but that has been entirely settled.

The land in the Magruder and Midland Districts is what is known as fresh-water tide-land. The high tides of the river overflow it, and the June water rises over it and stands for a number of months, usually [60] about two months, and the system of reclaiming it is to build dikes or levees aroung the tracts, install tide-gates and pumping plants, and then construct ditches—main ditches leading the water from the land to a sump or catchment area so that it can and during periods of high water when the water on the inside is higher than the water on the outside; and during periods of high water when the water on the outside does not fall sufficiently low to admit of its being discharged adequately through the tide-gates, there are pumps installed to pump the water from the inside over the levee. The pumps take care of the June freshet. During the time of the June

(Testimony of R. B. Magruder.)

freshet, the tides will not act in that location. They do not go down sufficiently low.

On each district there is a pump station erected by the defendant and a number of farm houses. These are owned by people who have bought or leased land from the defendant. Some of them belong to the defendant and are occupied by lessees. Others are owned by people that purchased the land or had contracts to purchase.

Plaintiff's Exhibit 1 is a map indicating the Clatskanie, Magruder and Midland Drainage Districts, and also a portion of the Beaver Drainage District, showing the relative position to each other.

(Exhibit 1 was offered and received in evidence without objection.)

"The levee on the Magruder district starts at a point just below Palm station on the S. P. & S. Railroad, runs around to Beaver Slough, then cuts across to the Beaver Slough again, follows the Beaver Slough to the junction of the Westport Slough, then follows the Westport Slough to a point about a mile below the junction to the railroad track to the higher land. Then the levee ends, but the district proper follows the dividing line between the high land and the low land back to the point of beginning."

"The Midland district is an island. Starting at the point where the Beaver Slough runs into the Columbia River, really at that point Wallace channel, following the Beaver Slough to the junction before mentioned of the Westport Slough, then it follows the Westport Slough [61] to a bend about

(Testimony of R. B. Magruder.)

two miles below, then it cuts through the Wallace channel and follows up Wallace channel to point of beginning.

Plaintiff's Exhibit 2, offered and received without objection, is a plat of the Midland Drainage District filed in the clerk's office of Columbia County in which the dedication of the roads and drainage ditches and the acreage of the plots and their boundaries are as it was platted out all shown here. This plat was filed by the defendant. At the time it was filed defendant owned the entire property.

The pumping plant on the Midland Drainage District is located at practically the lowest point in the district, where "Tide-gate" is marked on the map, and below is "Boat Landing." It is on Lot 81.

"Beginning at the pumping plant, there is one canal that follows easterly up to about three-quarters of the distance to the extreme end of the district. Then it cuts across the district to just inside the levee and returns to the tide-gates." The drainage ditch borders on lots 47, 48, 50, 51 and 52. There are various minor ditches in that district. In fact, between nearly all of the tracts, there is a ditch constructed by the company, which was about three and a half to four feet deep and about three feet wide on top, that separates the various tracts from one another, serving the purpose of lateral drainage ditches, taking water from each lot, drains it into the main canal and thence to the pumping plant.

The pump on the Midland District is a fifteen-inch pump. It is a Simpson Iron Works centrifugal

(Testimony of R. B. Magruder.)

pump run by a gas engine. Distillate is used for that purpose. The manufacturers' guarantee is that this pump will take off ten thousand gallons a minute.

Plaintiff's Exhibit 3, offered by plaintiff and received without objection, is a map of the Magruder Drainage District.

In the Midland Drainage District there are 1,298 and a fraction acres platted. We usually speak of it as 1,300 acres. That is the entire amount, improved and unimproved. In the Magruder Drainage [62] District the pumping plant is located at a point marked "Pumping Plant" and "Boat Landing" on the line separating Tract 12 from Tract 13. It is on the Beaver Slough near the junction of the Westport Slough. There is a slough, an old slough that is closed at one end, connected with this pumping plant, a tide-gate is located at the same point, that meanders out in this direction, separating tracts 14 and 16 from 17 and 18, and then from that slough at a point where tracts 11, 13, and 20 join, the slough is connected by a ditch which follows the railroad track to a point between 25 and 26. Then there is a ditch running parallel to the railroad east and west down to the extreme end of the district on the south side of the track. I might say that the railroad separates the tract in two parts, although it is connected by the same drainage system. There is nothing down there that will allow the water to go outside of the district. There is one tide-gate in each district. The one in the Magruder District has three openings for discharge, and the one in the Midland has four. These

(Testimony of R. B. Magruder.)

openings are at the same location as the pumping plant in each district. Each tide-gate is constructed as follows:

It is composed of a front wall, front and back wall, and wings constructed very similarly to a highway culvert, only instead of having an opening entirely through, there is a gate suspended on hinges on the outside that when it is closed butts up against the chamber. On the Midland district there are four of these gates and each opening is five feet long and four feet high. The theory is that when the water is lower on the outside than it is on the inside, the pressure of the water will cause the gates to swing out and discharge the water from the inside. When it closes the gates by the tidal action, the gates close automatically, that prevents the water from the outside coming in, and the catchment area, the ditches and catchment areas, hold the water until the next tide, when the same operation is repeated.

The pumping plant in the Magruder District is an exact duplicate of the one in the Midland District. The Magruder District comprises about 650 acres. The pumping plant in this district is larger in proportion [63] on account of taking care of a certain amount of hill drainage coming off the hills, the upper land. The tide-gates operate when the water in the river is low enough so that the low tides, the low run-out, take the water out automatically by reason of their going down below the desired elevation that is required for the water on the inside. But during periods of high water in the river, when the

(Testimony of R. B. Magruder.)

tides and high water neutralize, and the low tide does not go down sufficiently, the object of the pump is to take the surplus water out, as in the month of June, when we have our summer freshets, or during periods in the winter when the water is high in the river.

The high-water season usually runs from May to July, according to the regular flood season in the Columbia River. We have high water some years down there in the winter season. The circumstances of the formation of the Midland District and what was one are as follows:

That was by the Columbia Agricultural Company, the owner of the land—it was desirable to place the land on the market. There was no sufficient drainage law as there was in some States to organize under, so the owners devised a district by agreement, modeled to some extent after similar districts that had been in operation in California; and in order to make the district permanent and put the obligations on the future purchasers and make them run with the land, the plan was adopted to draw up the necessary regulations and make a deed from the Columbia Agricultural Company to me, in which these restrictions and obligations were embodied as covenants, and that deed was recorded so as to get it on the public records, and then the property was deeded back to the Columbia Agricultural Company. Subsequent sales have been made subject to those covenants. The district is not a corporation, but partakes of the nature of a partnership in which the defendant is one of the partners, and any of these individuals who might have pur-

(Testimony of R. B. Magruder.)

chased property there are the other partners for the operation of the district. The defendant owns a majority of the land in the Midland District, considerably more than any other ownership. In 1917, I think it owned about 700 acres, and 600 acres were contracted outside. [64]

The trustees of the Midland District in 1917 were W. H. Clark, who was a contract holder, A. H. Brix, a contract holder and stockholder in the defendant, and myself. I am not sure whether Mr. Brix was an officer, but he was a director, and I was manager of the defendant at that time. Two of the three trustees on the board were members of the defendant.

The Magruder Drainage District was at first organized in the same way, but subsequent to the date of the lease it went through the regular legal processes under the State law to incorporate it as a drainage district, but it was not at the time of the lease incorporated under the State law. The defendant owned about two-thirds of the lands in the Magruder District at the time of the lease, and had been selling off lands prior to that time.

The pumps in the Midland District were operated in 1917. "I should say that as soon as the water from the June freshet went down and got to a normal stage, there would not be any more pumping. But now that varies from different years. Sometimes there is a long June freshet, and other years it closes early." The pumps were not operated in either the Magruder or Midland Districts after July 31, 1917. About December 14, 1917, when I got back from a

(Testimony of R. B. Magruder.)

trip in the east, the foreman Wak made a demand that the pumps be operated. Later on a letter was written by the plaintiff demanding that the pumps be operated. They were not operated for the reason that at that time there was so much water on the district that the pumps could not discharge the water in time to save what crop there was in it. There was no attempt to operate them. They were not operated for the reason that it was absolutely hopeless. It would have taken four or five days to get distillate on the ground to operate the pump, and there was no distillate there when the demand was made.

Cross-examination.

The trustees were elected by the property owners of the district at annual meetings held for that purpose, and each property owner or contract holder was entitled to a vote for each acre or fraction of an acre that he held in the district. [65] I might say that the invariable custom in electing trustees, because I think I attended nearly all of the meetings, was as follows:

There were nominations made of the different persons who were eligible to be trustees or who were willing to accept it there was a great deal of work attached to it and they all tried to shirk the responsibility; finally when they would get enough to make up the board who would agree to do the work and assume the obligations, the other property owners were allowed to vote for them, and whichever way the majority of the votes went, the defendant would throw its acreage in and make it unanimous.

Testimony of Seid Chung, for Plaintiff.

SEID CHUNG, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination.

In 1917 I lived on the ranch at Clatskanie and worked for plaintiff as bookkeeper. Began to work for him March 9, 1917, and I took care of the time and paying out money, and assisted him in getting men. I worked there for him about a year. There were fifteen other Chinese there on the place working for plaintiff. They plowed the land and planted potatoes. Ah Yip oversaw them.

At the time we planted potatoes we had more men, about twenty in all. In December, 1917, there were about forty-six men.

We stared to plant June 6 in the Magruder District. We did not plant earlier because the weather was interfering, and the lease was made too late. What interfered with our planting was the ground was too wet. We stayed while on the Magruder District at the China house at the head of the district. Then we went over to the Midland District and moved into a camp there. In the Magruder District there were old houses there, but houses were built in the Midland District about the first of April, after I got there.

In the Magruder District we first plowed 24 acres in tract 18, and 36 acres in tract 19, and tract 17. Then we moved to Midland District, plowed a little there for vegetable purposes in tract 53, then plowed

(Testimony of Seid Chung.)
tract 54, 52, 48 and 49, and then we began to plant potatoes [66] and some oats in the Magruder District, planted them on tracts 17, 18 and 19. Then we moved camp to Midland District, planted about an acre of potatoes and a little in vegetables on Tract 30, four acres of potatoes and the rest in oats on tract 53; tract 54 all planted in potatoes; tract 52 planted, four acres in beans, the rest in potatoes. Then we planted potatoes in tracts 48 and 49. At the end of each tract up and down there are lots of stumps and brushes. There were a little along the drainage canal here, some stumps and lots of brush, and we pulled out of a whole lot of stumps.

We did not plant any other tracts in Midland District, but we cut two tracts of wild hay. In the Magruder District we took only the three Tracts 17, 18 and 19. The rest we did not take. We did not use; lots of brush. It is very wet and lots of wild brushes there and shrubbery. It was wet when we went there in March and stayed wet until we went there and re-dug the ditches and drained it off. Had fifteen men digging the ditches about a week. They dug ditches along the left side of 19, between 18 and 19, between 17 and 18 and at the upper side of 17. There were no ditches on Tracts 15 and 16. Because there were no ditches it was wet. I did not know what was the matter with Tracts 7, 8, 9, 10, 11 and 20. We cut hay from Tracts 45 and 46 in Midland. We did not use Tracts 66 and 67, because there were lots of stumps, and the grass come up to an immense height. We did not use Tracts 37, 38, 39 and 29, for

(Testimony of Seid Chung.)

there were lots of stumps and brush there.

The barns and buildings are on Tract 30; it is not good for planting. We used the barns and buildings. We did not use Tract 31, 34 and 35 because there are trees on them. Did not use Tract 37, 38, 39, 41 or 44. I do not know anything about that nor the three lots on "Uncle Tom's Slough." We cut hay from Tracts 45 and 46. Used Tracts 48 and 49 to plant potatoes; planted about 40 acres on them. On Tract 52 we planted potatoes except three acres in beans. On Tract 53 we planted four acres of potatoes, and the rest in oats. Tract 54 planted in potatoes. Did not use Tract 67—lots of stumps and brush. Did not use Tract 66—don't know [67] why. Did not use Tracts 79 and 80; don't know why. Do not know how many acres of hay were cut off lots 45 and 46. We just cut off the two tracts. Cut the hay from all the acres on the two tracts.

We planted about 114 acres of potatoes. Thirty of them were in the Magruder District, and eighty-four in the Midland District. We used about ten or eleven sacks of seed to the acre; got it from Portland, Oregon. Potatoes were cultivated with hoe and plow, then put the dirt on the row. We used 1,270 sacks of seed in planting the 114 acres. We did not harvest all these potatoes. We first dug about an acre of potatoes near the barn. That was the tract we planted earliest in the season. Then we moved camp over to Magruder District, moved the men, teams, implements and tools. Put them on a scow. A boat towed the scow. It was very difficult to

(Testimony of Seid Chung.)

move them. Dug the potatoes in the Magruder District in front of the China house in Tract 19. We dug them in the same order in which they were planted. Began to dig them the 15th day of October, 1917. The reason why we did not start to dig earlier was because the potatoes were not mature. It takes between 130 to 140 days for a potato to mature. We dug all the potatoes in the Magruder District. Dug some of them in the Midland District. We could not dig some on Tracts 48 and 49 and could not dig about six or seven acres on Tract 52, and could not dig a little over an acres on Tract 53. We dug no potatoes on Tracts 48 and 49. It was all flooded by water. It came from rain. It first began to rain hard about the 1st of November. At first not so hard, harder toward the last. Began to rain hard about the 14th or 15th of December. It got so we could not dig.

There were pumps there to take the water off in the Midland District. These pumps were not used either in November or December. I told the foreman to tell the officials of the defendant to request the pumps to be operated. Finished planting potatoes in Midland District about the 14th or 15th of July. We were on the property about two or three weeks before the houses were finished in the Midland District. [68] We dug 8,272 sacks of potatoes. We sold over 4,000, and kept a little over 4,000. I counted them. I have the record of it right here. There were about 125 to 126 sacks to the acre. The sacks would weigh about 117, 118 or 120 pounds.

(Testimony of Seid Chung.)

Sometimes the sacks were very full; sometimes not so full; sometimes closed; sometimes open; sometimes sewed closed; some times potatoes will stand out.

During the time the flood was on the ground there were about forty-six men besides the foreman and myself. The flood started about the 14th or 15th of December, and the men were there waiting two weeks after this. If the weather had been good, it would have taken the men about two weeks to dig the acreage covered by the water.

Q. What does Seid Pak Sing pay those laborers that were there?

(This was objected to by defendant and all this line of examination with regard to the men who were there after the potatoes could not be dug, on the ground that it is not the proper measure of damages, which objections was overruled and an exception allowed.)

Plaintiff paid these men $40 a month besides their board, which is about 50 cents a day. I pointed out the land where the potatoes were drowned out to the surveyors, recognizing it from fences, ditches, trees and barns.

I did not make any meansurment of the amount of land that was cleared land in the Magruder District. I do not know how many acres of cleared land there were in the district at that time. I only guess at it. Some of the land that had brush on it and stumps was down near the drainage ditch. I got my information what land I was to put into crops from the

(Testimony of Seid Chung.)

foreman, Wak. He attended to the planting. I never had any talk with Mr. Magruder as to what land was to be planted in the Magruder District. He told the foreman what I was to do. I got my information where to plant from the foreman. We had 114 acres in potatoes in both districts, and we cut some hay from the two tracts, 61 acres. We had three acres in beans. When we began planting potatoes in the spring, I had about 20 men. We used only 20 men to plant potatoes. We had ten horses and six plows. The potatoes were planted in rows. Those men could plant about four acres [69] a day. The rain began to fall about the 1st of November; it did not rain continuously, but from time to time it began from that date to rain. I remember the latter part of November it began to rain hard. After we began to dig potatoes until the heavy rains came, there was days when my men did not dig all day because it was wet. I do not remember how many days there were times it rained some; then we had to stop; then rain again; we have to stop, until the 14th and 15th of December until it started so that we could not dig at all. Unless it rained awful hard we would dig. Ordinarily rain would not stop us. There were times before November 26th that we stopped digging on account of the rain. I do not remember how many times. When it rained hard we would not go out. We could not dig. If it rained a little we dug.

I had been in Oregon before. I came here to work for defendant, but I have never farmed or raised any

(Testimony of Seid Chung.)

potatoes in Oregon before. I had had no experience in knowing how long it took a potato crop to mature in such a soil as that, but I know 130 or 140 days. I know W. H. Clark. No one during the fall of 1917, when we were digging potatoes, said anything to me about having trouble with the rain if we did not get the potatoes dug. I never heard anyone say anything of this kind to Mr. Wak or to anybody.

I worked with the men in the field sometimes. I have no distinct recollection that it began to rain hard about the 1st of December. It rained until December 14th or 15th; then we had to give it up entirely. The water flooded so that you cannot see the land. We dug until the flood flooded the land. The furrows on this tract where the potatoes were lost ran down toward the drainage ditch, and the potatoes had been hilled up. The ridges of land where the potatoes were hilled up ran down toward the ditch, the big ditch, but not to the small ditch. The only way these tracts were drained in the big ditch was by smaller ditches running along the same tract toward the big ditch and there were none of these smaller ditches except on the line between the different tracts. So the only way you could get [70] rain water off from this potato crop was by getting it from the furrows where it would be standing into this small drain, which would carry it to the main drain.

Q. After it had rained pretty hard the furrows filled up with water so that you had to stop digging?

A. Just as I said, it was on about the second or

(Testimony of Seid Chung.)

third day of the eleventh month (December 14th or 15th). At that time the rain was so hard that these furrows filled up with water, when we had to stop digging. We started to dig with 36 men in the fall. We dug the Magruder District and then we had some more men. We started to dig October 15th and dug until November 10th, when we got through on the Magruder District. We had only 36 men there up until November 10th digging those potatoes. They were dug by hand and forks. We did not use potato-diggers or plows. The potatoes were carried to the storehouse near the river bank. The sorting of the potatoes was done at the time of the digging in the field. We would put the small potatoes in one basket, another size in another basket, and another size in another basket. Just as soon as we dug them we sorted them right there. In carrying the potatoes from the field, sometimes one man was employed with a team and sometimes two. There were two wagons used in hauling the potatoes in the Midland District and one in the Magruder District. Each man who was digging had three baskets to put three different size potatoes in. I have not record in the books that plaintiff collected rent for some hay land on the Midland and Margruder Districts. I do not know whether anyone representing plaintiff rented some of that other land for pasture or for hay. Never heard of that. We got through digging one place and then we moved to another place and we had twelve new men. Some came from Portland, some from San Francisco.

(Testimony of Seid Chung.)

Q. Do you know when these men came up from San Francisco? A. Yes.

Q. When did they come up? [71]

A. About the middle part of the eighth month Chinese calendar (that is, about September, latter part of September) we sent some men up here to help us clear the land.

Q. What did these men come up for?

A. We asked them to come primarily to dig potatoes.

Q. How many?

A. One crew was 15 men.

Q. Didn't you say that there were twelve men that came up awhile ago?

A. Later there were twelve men, but the first crew was fifteen.

Twelve men came up after we moved the camp. We moved camp November 10th, and they got there November 14th. There were one or two men came up from California besides. After December 1st we had the crew about completed. Twelve men came up December 7th.

Redirect Examination.

Sometimes when the rain interfered with the men then they may be work one hour or two hours. If it was a good day they work about nine hours. I saw timber, stumps and brush on the tracts down there myself. Wagons were used in carrying the potatoes. We dug the potatoes as fast as they were ripe or ready for digging. There were three baskets to two men.

(Testimony of Seid Chung.)

COURT.—Do you claim that these potatoes were not ripe until December?

Mr. RANKIN.—We claim, your Honor, that they were planted at various stages, commencing when the evidence shows they started in planting, and ending some time in July; that they were harvested according to when they were ripe, 130 days later. That would bring this tract that was planted last harvested last.

COURT.—I understand there were about 48 acres you claim were not harvested?

Mr. RANKIN.—No, not 48. Something near 40.

COURT.—You claim those potatoes had not ripened until December? [72]

Mr. RANKIN.—Yes. Counsel says they had ripened, his understanding of the testimony was they were ripened but had not been harvested, and would be harvested.

COURT.—At what time do you claim they would have been harvested?

Mr. RANKIN.—We claim they would have been harvested during the middle of December.

COURT.—Did they ripen earlier than December 1st?

Mr. RANKIN.—Probably they were ripe by December 1st; yes.

Testimony of O. V. Lajesse, for Plaintiff.

O. V. LAJESSE, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. RANKIN.)

I live in the Midland Drainage District; have lived there six years off and on; have farmed in that district. My brother also owns a tract there. I have raised potatoes there. The ground is always too wet in the spring for potatoes. That condition lasts until about the last of May. As a rule, they start pumping about March and pump until June. Do not recall whether they pumped after June or July, 1917. They never pump after June or July to my knowledge. Customary yield of potatoes per acre in Midland District is about 100 to 150 sacks. I know the character of the land, the Chinese farm there. I was there when they farmed this land in the Midland District. For six years I have seen the potatoes that were raised down there. I have seen potatoes taken out of the ground there in January. They were planted in 1914 and dug in January, 1915. That was in the Midland District on a tract owned by Alice Balcom. It was on a tract that the Chinese were living on. He did not get all of the potatoes out of *the that* tract. The reason was on account of the frost first, and then the water came over it. On account of the frost he could not dig the potatoes and then the water came over it and he could not get them out. I do not know of any other parties that

(Testimony of O. V. Lajesse.)

lost crops [73] down there by drowning. Mr. Balcom lost between 13 and 15 acres. They were put in in June, 1914. Part of them were harvested, and part of them lost in January, 1915. I saw the Chinese at their work down there. They seemed to me that they were working right along long days there, about 10 hours a day. They continued that while I was down there. I was there in the spring and I was there a while about the middle of summer, and then in November. I was there the latter part of December. During the summer I was there just during hay time. I judge that the best method to harvest potatoes in the Midland District was by hand, because you get them out cleaner. The best method to plant is by hand because you get your potatoes in deeper, better, even. I am harvesting with machine this year. Previously I had harvested by hand. I have harvested some by hand this year and some by machine. The result of harvesting by machine this year is they leave so many in the ground, and can't get them out.

Cross-examination.

(Questions by Mr. CORLISS.)

Balcom, who put in these potatoes had between five and six acres altogether. They were planted about the 4th of July in the Midland District.

Q. And how near this land in question?

A. I didn't get that.

Q. Well, how near the land that is involved in this case, do you know, was the land that those potatoes were on? A. Yes, sir.

(Testimony of O. V. Lajesse.)

Q. How near that land was it?

A. Near where they was planted, do you mean?

Q. Yes.

A. Well, it was some of their tract they were planted.

Q. Do you know the land on which this plaintiff claims he lost some potatoes in 1917?

A. Yes. [74]

Q. Now, how near that land was it that these potatoes that were dug in January were located?

A. I don't get you.

Q. Five hundred feet or 1,000 feet?

A. No, it was right by the drain table.

A few of these potatoes were dug before January, 1915. There was a lawsuit came off; that is why they were not dug until then. There was about half or an acre dug when they started before they stopped digging. The reason why he stopped digging then was because of a lawsuit. He didn't leave his potatoes in the ground for the winter months because he thought it was good farming.

I think about 100 sacks of these potatoes were finally dug in January, and the rest were destroyed by water and frost.

Q. So in that case it looked as though that experiment of leaving potatoes in late was not a very good experiment, didn't it?

A. Some years it might be; other years it may not be.

The weather conditions were just about as usual that year for leaving potatoes in the ground. I re-

(Testimony of O. V. Lajesse.)

member that a large volume of rain fell in the month of December, 1917.

Q. In all your experience there, had you ever seen such a volume of rainfall during that month?

A. Yes, I have seen it.

Q. As much in any December since you have been there?

A. Well, may be not as much just the same in December.

I have been in the Midland District six years off and on. The ground is too wet by December to get anything off anyhow, in December. Potatoes do not do any growing after December 1st if you leave them in the ground. If you have an early frost there which kills or hurts the vines, that stops their growing. I do not remember whether there was a heavy frost in the Midland District that killed or damaged the potato vines about October 26 or 27, 1917.

Q. Do you consider it good farming for a man to leave his potatoes [75] in the ground as late as the month of December in such a section as that is?

A. It ain't good policy in a way.

Redirect Examination.

If the water is kept off the potatoes they will stay there in the ground all right. They have stayed in January the year I was there. That is the only patch that stayed that late that I know of. It won't hurt them if the water is kept off, to stay in that ground so far as I know.

Recross-examination.

Q. Isn't it a fact in your experience that that

(Testimony of O. V. Lajesse.)

ground is very spongy and soft and will absorb a good deal of water from rainfall?

A. Well, if the drainage is kept down, it will come off it.

Q. I didn't get that.

A. I say, if the drainage is kept down.

Q. Doesn't that depend on the question whether it is raining practically every day a quite large volume or not, as to whether your land will be dried by the ditch?

A. Well, if the drainage is kept down, it will come off the ground.

Q. Do you mean to say the rain will run off the ground as soon as it falls?

A. No, not as soon as it falls, no.

Q. Suppose it rains practically every day and that the average rain is two-thirds of an inch a day right through the month, do you think that potatoes would stand up under those conditions?

A. I think it would if the drainage ditch was kept down low.

Q. What experience have you had in that so that you are able to testify?

A. That would be my idea, on account of them there potatoes I saw there in January, that the water didn't get up that year to them, that they was all right. There was the heavy rains that winter, I know, before the potatoes was attempted to be dug. I do not know about the rains in [76] November, but there were rains in December. I could not tell how many inches of rain fell; it rained lots there, but it

(Testimony of O. V. Lajesse.)

was not heavy rains—light rains—I do not know as it was nearly every day. I wouldn't swear it rained every day in December, 1914, or that it rained one-half the days in December, 1914.

Direct Examination.

I know it rained some heavy rains, but I do not recall at this time just what the rainfall was.

At this time plaintiff's counsel asked the Court to be allowed to amend the complaint herein as follows:

"In the fourteenth line after the words 'said property from water'; and commencing with the word 'that,' the following is stricken out: 'That said Tract 1 and Tract 2 at the time of making of said lease was free and clear of water, and ready for agricultural purposes, but.' That much should be stricken out, and in order that it may read intelligibly after that, commencing with the word 'that' in Line, 16, I guess it is, directly after the word 'but,' that has been stricken out, it should continue as follows: 'That owing to the character of said property in Tracts 1 and 2 it was necessary for defendant to install.' "

Thereupon the following proceedings relating to said amendment were had:

Mr. CORLISS.—Now, if that amendment should be allowed at all—it is a pretty radical amendment, if your Honor please, in the case,—it should at least be upon the condition that they do not predicate upon it any charge that we were at fault in not having it in condition in the spring of 1917, and simply as explaining why they got the crop in late. I under-

stand that is the purpose for which they want an amendment made, so they can say the land was wet and that they got the crop in late. But your Honor can readily see if they allege that we failed to pump and did not have the land [77] ready for seeding, that is an absolute complete change of front or cause of action. Your Honor can see that very plainly.

COURT.—I understand the plaintiff is not accusing you of injuring them by reason of starting late in the putting in of the potatoes. You are not basing your action upon that ground?

Mr. RANKIN.—No, your Honor. The only purpose that we are asking this amendment on, and the only purpose that we would use it for, is that counsel says in his opening statement that we were shown over 400 acres of land. Now, our own testimony as already introduced to some extent disclosed that some of that land was so wet that we could not plant it; and yet they are charging us for rent for this property that we could not use. In our allegation here we allege that it was ready for agricultural purposes practically. As a matter of fact, it was not ready for agricultural purposes, and we do not want to be held for rental for land that we could not use for the purposes for which it was being rented.

Mr. CORLISS.—Of course then counsel does admit he wants to use it and charge us up with fault.

Mr. RANKIN.—No damages arising from it.

Mr. CORLISS.—No, but you want to cut us down $1800 rent. If it is going to be used for that purpose, we should resist it, because it is an absolute

change of front of this lawsuit. But if it is only to be used as an explanation why they perhaps got their crop in late, and perhaps would be justified in harvesting it late, if that is the sole purpose of it, I suggest, if it comes in at all, it come in on the basis of that stipulation.

Mr. RANKIN.—We do not want the amendment, if you are going to put a string on it so it won't do us any good. Those are the facts of the case. I think at any time, even at the close of our case, we would be entitled to amend our pleadings, in the discretion of the court, to make the allegations conform to the proof. [78]

COURT.—Said tract 1 was defined as 400 acres in the Magruder and Midland Districts. That was the tract comprised by the contract.

Mr. CORLISS.—The lease contract relates to all the districts.

COURT.—Tract 1 is what I am referring to. Now, it turns out that there is practically no controversy here unless it be for rent, over any other part of either of these districts except tract 1.

Mr. RANKIN.—That is all.

COURT.—It turns out further by the testimony here, or it is so indicated and it is so claimed by the plaintiff, that he did not get the 400 acres; he only got something like 200 acres. Now, the question comes up here, and that will apply to the rental I suppose, on the 200 acres, as to whether he really got more than 200 acres. Counsel says that they don't want to admit that this tract 1, or as they have described it

stand that is the purpose for which they want an amendment made, so they can say the land was wet and that they got the crop in late. But your Honor can readily see if they allege that we failed to pump and did not have the land [77] ready for seeding, that is an absolute complete change of front or cause of action. Your Honor can see that very plainly.

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COURT.—It turns out further by the testimony here, or it is so indicated and it is so claimed by the plaintiff, that he did not get the 400 acres; he only got something like 200 acres. Now, the question comes up here, and that will apply to the rental I suppose, on the 200 acres, as to whether he really got more than 200 acres. Counsel says that they don't want to admit that this tract 1, or as they have described it

here as tract 1 and 2, was free from water at the time this contract was drawn. They don't want to admit that fact, because they only got practically 200 acres, and if they admitted that fact, it would be contrary to what the fact is in the case; and the amendment is sought for the purpose of relieving plaintiff of inadvertently admitting a thing which is not true. I do not see any reason why it should not be amended to correspond with the fact, and the only question that will arise now upon this point, as I understand it, will be as to the acreage which the plaintiff occupied of this property.

Mr. RANKIN.—That is right.

Mr. CORLISS.—And not for the purpose, as I understand it of charging us up with any legal fault on the condition of the land in the spring of 1917.

COURT.—That is as to the damages which might arise by reason of your not pumping the water from this district in order to keep the land in condition to permit them to harvest their crop. I do not see that it would have any bearing on that, because it is admitted here now by Mr. Rankin that the crop had matured the first of December. So I do not see now that could injure you. [79]

Mr. CORLISS.—I think, if your Honor please, probably your Honor has fully protected us on the amendment, but you cannot always tell in the hurry of trial, and I think, your Honor, we will note on exception to the ruling of the Court.

(Testimony of Ah Yip Wak.)

COURT.—Very well; you may have your exception.

Testimony of Ah Yip Wak, for Plaintiff.

AH YIP WAK, called as a witness on behalf of the plaintiff, being first duly sworn, testifies as follows (SEID GAIN acting as interpreter):

Direct Examination.

(Questions by Mr. RANKIN.)

In 1917 I lived on the ranch at Clatskanie, Oregon. I was working for plaintiff as a foreman under the lease in this case. I went there March 9, 1917, and supervised the work of the men. We first fixed the ditches in the Magruder District. This took about a week. There were twelve or thirteen men there. I selected the land we would farm in front of the house. I selected the dry land first. Mr. Magruder took us to the place and told us that land belonged to him and told us to go ahead with it. He pointed out all the land belonging to him and he told me to plant the dry land. He pointed out wet or brushy land but I did not want to use it. We went to the Magruder District first. Plowed about 40 acres there. We planted that land later; thirty acres in potatoes and the rest in oats. We plowed the Magruder District first and then about two or three weeks later we moved the camp to Midland District. When we moved to Midland District the buildings there were finished. We plowed in the Midland District about 114 acres; 84 acres we planted to potatoes. In harvesting the potatoes we dug those first that we

(Testimony of Ah Yip Wak.)

planted first. The reason why we did not plant any more than 40 acres in the Magruder District was that it was too wet, covered with water. The reason why we did not plant more than 114 acres in Midland District was the land was too wet. Besides [80] there were plenty of stumps, trees, brush. There were stumps and trees and brush and water on those tracts shown me by Mr. Magruder, which I took. We did not harvest all the potatoes that we planted, because some was flooded by water. About 41 acres drowned by water in tracts 48 and 49. There were two other smaller patches drowned out. About six or seven acres in the 25-acre tract, and about one or two acres in the 21-acre tract. The potatoes were drowned out near the digging time. It rained so that the water was high, and we had to move around in a boat, and then we stopped. We stopped digging about December 14th or 15th when the water was very high. There was some rain before that. We dug when it did not rain too hard. Before the big rain of December 12th or 14th there was some rain, but it was not so very hard. The pump was not operated during that fall or winter. I asked Mr. Magruder to pump the water, and he said there was no fuel oil. I do not remember how long it continued to rain hard, but it was about a week. Magruder said that the government had taken the oil, when I asked him to pump. I asked him to pump first, and then he was gone. At the time I asked him to pump before he left, he said open the gate, and he had the gate there to let the water in and out. I

(Testimony of Ah Yip Wak.)

believe he called it the tide-gate. Before Magruder left Clatskanie, when I asked him to take the water off the land, he said open the tide-gates. After he came back to Midland District house, I askeh him again to pump the water when the water flooded the potatoes. Then I asked him to pump the water to save the potatoes, and he said he can't do it. He said he just won't pump. That is all. I saw Mr. Magruder a number of times about pumping the water, quite a few times, so many times that I don't remember. Sometimes when he came to our house, or met him on the canals and I even went to his own house. When Mr. Magruder was away Mr. Johnson worked for him, and he said he had no power to pump water. He did all kinds of work for Mr. Magruder. Whenever Mr. Magruder told [81] Mr. Johnson to pump water, he would pump it. He was the man that pumped water for the district. At the time Mr. Magruder was back at Clatskanie, he said the canals were full of water-overflow. I do not remember the date Mr. Magruder came back to Clatskanie. It was after the big rain, when the place was all flooded. When the canals were full of water, the land inside of the district was wet—very wet. The lower land was quite wet, but the upper land was not quite so wet.

Q. Was there water on top of the land, standing on the land?

INTERPRETER.—Let me explain, Mr. Rankin. Chinese call ditches sometimes canal and it is awful hard.

(Testimony of Ah Yip Wak.)

Mr. RANKIN.—What term does he use—slough?

COURT.—Ask him if the water covered the land.

Q. At the time the water was high in the sloughs, did the water cover the land where the potatoes had been planted?

INTERPRETER.—I don't know what he has reference to slough myself.

Q. All right, he knows slough.

A. Yes, the potatoes were under water.

I have been raising potatoes about 15 or 16 years in California. The average yield per acre on the land in the Midland District was about 130 or 140 sacks, and the average was about 118 pounds to the sack.

Cross-examination.

I do not remember the date when I first had a talk with Mr. Magruder about having the pump operated, but I remember asking him to pump the water just as soon as the slough had water. I remember he went away, but I do not remember the date, and I don't know where he went. I don't remember how long he was gone. At the time I asked him to pump it had been raining some. I didn't ask him to pump until the slough was covered with water, and I was afraid the potatoes would be drowned—the first time was before he went away. I asked him quite a while [82] before he went away. I don't remember how many rainy days we had had at that time before I first asked him. Sometimes it would rain two or three days, and then stop a while, and again it might rain one or two hours, stop again. At the time I

(Testimony of Ah Yip Wak.)

asked him the first time to pump it rained so much that the main drainage ditch was pretty full. There was water in it. It was about half full. I don't know how long Mr. Magruder was away. I asked him very shortly before he went away, not very long before. He went away frequently. I don't know where he went, but he went away very often. The time he went away long long time I don't know what date he went, but before that he went away from time to time. I remember that he did go away for quite a while and stayed away a long time.

Q. How many times before he went away and was gone quite a while did you ask him to pump?

A. So many times I have forgot it.

Q. So many times you forgot it. As many times as twenty times? A. Not twenty times, no.

Q. Ten times?

A. There was so many times I don't remember the exact number.

Q. When did you begin to ask him to pump—how early in the fall?

A. I don't remember the date, but just as soon as the slough was covered with water I asked him to pump.

At that time we had not dug very many potatoes. We began to dig these potatoes about the fore part of November. I did not keep track of the date—the bookkeeper did, and just as soon as the potatoes were matured, we went and dug them. Said Chung was the bookkeeper. He had a record of when we began to dig, and he ought to know better than I. I re-

(Testimony of Ah Yip Wak.)

member that when the potatoes were matured we dug them. I remember only when the land was covered with water and I asked him to pump.

Q. Was the land covered with water the first time you asked him to pump? [83]

A. Not the land with water, but just as soon as the slough and the ditches were covered with water I asked him to pump.

After he came back I asked him again to pump. At that time we were not digging potatoes. We could not dig any. They were flooded. When he came back it was flooded. It had been flooded quite a while before he came back. We dug potatoes until December 13th or 14th. and then there was so much water we could not dig any. For two weeks before that we had dug quite a few potatoes.

Q. Hadn't it been raining right along nearly every day for more than two weeks before you stopped on the 15th of December?

A. Yes, it was raining some, but if it didn't rain too hard we would dig. If it rained too hard we could not dig.

These potatoes had been hilled up and were in parallel rows about 18 to 20 inches apart Chinese measurement, and in the other direction about 12 to 14 inches apart. And between the rows of potatoes there would be low ground where they had taken the earth to hill them up. Some of these furrows ran down toward the sloughs, while other rows ran to the ditches. Some of them were planted running toward the canal while others ran toward the big ditch.

(Testimony of Ah Yip Wak.)

These small drains that drained the water from the land into the big drain ran parallel with the field. Each tract of land there was a ditch every so often there was a ditch. On the side of each tract there was one of these small ditches running down to the main canal. I don't know how far apart they were on the tract where we lost most of the potatoes. When we began our spring work on that land, we had about 20 men and 10 horses. On one plow we used two horses. Before we dug potatoes we had just 20 or 20 odd men. They were all the time busy from morning until night putting in the crop and cultivating it, and they did all the work they possibly could.

Q. You could not have cultivated any more of that land with that same number of men could you? [84]

A. We had sufficient men to take care of lots of ground, but some of the land we could not use.

Q. Were these twenty men that you say you had there from the time you began to cultivate the land until you began to dig potatoes were they busy all the time?

A. Yes, worked all the time; lots of work on the farm.

They worked long hours from early morning until late at night. In the 25-acre tract we put in three acres of beans. This was in the Midland Drainage District. We had about ten odd acres in oats. We did not use any of that land for pasturing our horses that year. We fed our horses by cutting enough of our own grain, and we bought some feed. We sowed

(Testimony of Ah Yip Wak.)

some of our own feed, and then we cut 320 bales of wild hay and that was shared with another white man. We cut this hay that we baled on this land in the Midland and Magruder Districts. I don't know how many acres there were, but I supervised the work and know there was that much hay, that many bales of hay cut and shared with another man. I didn't lease him this hay—we just cut it and shared it with each other. It was wild hay—didn't nobody want it. The white man got his share of it for his work on the hay. Our teams and wagon were attending to the hay, but the baling machine and other work belonged to the white man, so he took his share of the hay. Plaintiff did not sell any of this hay. I don't remember how many tons there were, but I only remember our share was 160 bales. They would weigh all the way from 120 to 150 pounds to a bale, some 115. I don't remember Mr. Pierce leasing some of this land in 1917. We didn't lease any of this land to him or collect some rent for it. At first I collected a little rent. I thought that piece of land was belonging to us, but I found out it was not ours, so I returned him his money. I don't know this man's name. He was the apple-man. He lived near one of the corners of the property. I didn't lease it to him. I didn't lease any of that land nor collect any rent from a gentleman named Burke. Neither did [85] the bookkeeper, Seid Chung. He didn't lease it to anybody. When Mr. Magruder turned over this land to me in these two districts, he didn't have much to say to us. I don't remember his saying that we

(Testimony of Ah Yip Wak.)

could have 400 acres out of that cleared land or take what we wanted, but he pointed out the land to me and I selected the dry land which was suitable for potatoes, and we used them. He took us to the land. He pointed out all the land, but I selected only the land that was usable. I didn't know how many acres the plaintiff had leased in these two districts. I didn't know what they had in the lease. I might have heard plaintiff say that he had leased 400 acres for that year in these two districts—I don't remember. I don't remember I told Magruder that we had not got all of the land we were entitled to; besides I don't know how many acres there were in the lease. I went to Magruder and told him what land I had selected. I don't remember the month when that was. I don't remember that I ever told Magruder that we were not going to take any more of that land.

Q. Did you ever go to Mr. Magruder and claim that you could not crop or use any more of that land?

A. Yes. He came to the camp and I told him certain land could not be used.

Q. What did he say?

A. He said all right; agreed to it.

Q. What land did you tell him you could not use?

A. Nineteen-piece tract, 22-piece tract, 25-piece tract—25 acres, I should say, not piece; 25-acre tract; the 48-acre tract, and an acre near the barn. I told him those could be used and the rest we could not use.

I don't remember the day when I told him this, but just as soon as we had planted our potatoes; and

(Testimony of Ah Yip Wak.)

told him we could not use the rest. We had got all the potatoes planted when I told him that. We finished planting potatoes July 14, 1917. A good man can dig in a fair day's work about eight to ten sacks in a day. When we began digging these potatoes we had about 32 or 33 men. Before we finished [86] digging potatoes we got some new men until we got 46 workers. I don't remember the day that we got the new men, but they came from time to time. At first we began with 32 men, then just as soon as these new men came, we put them on to dig potatoes. We didn't get 46 men right away after that date—we kept putting on some new men every little while. We had new men from time to time. I don't know how many men it would take to dig one acre in a day, but a man ought to dig ten sacks a day.

Q. You say you had 32 men when you began to dig. When did you put on those other 12 men?

A. I don't remember the date, but the bookkeeper knew. He had the record of them.

We carried on our farming operations on that land down to digging potatoes with about 20 men, 10 horses and about five or six plows. I don't understand much of any English. When I had these talks with Mr. Magruder I talked to him in very broken English. I understand English a little. I only expressed to him what I understood. I could not tell much of what he said to me in Engilsh. After the potatoes were planted I told Mr. Magruder that we would not take any more of that land except the land we had taken. I told Mr. Magruder what particular

(Testimony of Ah Yip Wak.)

land we had taken. He told me that we could have this wild hay, because he had no use for it.

1917 is the first year I planted potatoes there, but a year later I and Seid Chung took hold of the land again. I had no more experience than those two years to raise potatoes there. I did not have any trouble about the crop next year.

Redirect Examination.

The cabbages the second year were flooded by water; they were on the 48-acre tract, the same place that the potatoes were flooded out the year before. I do not remember the exact date Mr. Magruder left Clatskanie, or the day when he came back to Clatskanie.

Recross-examination. [87]

Q. And when you told about so much time before Mr. Magruder left, and so much time after Mr. Magruder left, you are telling about the times when you knew he was away and not when he actually left?

A. I didn't know where he went to.

Recross-examination.

The cabbages was flooded out next year when they had the big rain there; it was in the winter. I don't remember whether it was near Christmas or not.

Upon the trial plaintiff introduced competent evidence to prove that there were 40.558 acres of potatoes that were destroyed by the water, and the jury would be justified in finding that number of acres, although there was some evidence introduced

in the part of defendant tending to show that there were about two acres less.

There was competent evidence in the case from which the jury would be justified in finding that the potatoes that were destroyed would, if dug, have yielded from 112 to 140 sacks per acre of the average weight of from 118 to 120 pounds to the sack.

There was competent evidence introduced in the case by the plaintiff pertaining to prove that the market value of the potatoes of the kind that were destroyed, on the cars at Portland, Oregon, was from $1.25 to $1.40 per hundred pounds during the month of December, 1917.

Defendant introduced competent evidence tending to show that the value at such time and place was from $1 to $1.40 per hundred pounds, while the record does not show what the jury found such value to be. They were justified in finding it to be $1.40 per hundred pounds.

There was competent evidence in the case tending to show that the cost of digging the potatoes was from twenty to twenty-five cents per hundred pounds, and all other expenses of putting the potatoes on [88] board the cars at Portland, Oregon, was five cents per hundred pounds, sacks weighing 100 pounds.

Testimony of Seid Pak Sing, in His Own Behalf.

SEID PAK SING, the plaintiff, sworn as a witness in his own behalf, testified as follows:

Direct Examination.

I am the plaintiff. I reside in San Francisco, California. My business is *is* Chinese merchandise and farming. I made the lease with the defendant involved in this action.

Q. Just go ahead, Seid Pak Sing, and tell about entering into the lease.

A. I think the first time in 1917, January, at that time Mr. C. C. Low, coming down to San Francisco and he go to try asking me to buy that property, but I say I have no money for to buy, but I think I can take a lease. Then so after about a couple of weeks he ask me how much I going to pay that rent and I say, well, I pay how much you want? And he said he wanted me $12 for one acre, in about a week or so, then I say no, I never can pay so much. Then he talk and decide for $9.00 for one acre.

That is the terms we agreed upon in the lease. Mr. C. C. Low is a white man. I asked him who he represented and he say he represent the defendant. He said he had no power to sign the lease. He wired to Magruder to come down to San Francisco, and he came down and signed the lease at that time. Then I talked to him and asked him how about the land, and he said, oh, pretty good land. Before we signed the lease, I asked him about the land, and how about the weather, and he say well land pretty good and

(Testimony of Seid Pak Sing.)

the weather just the same as California.

After that I sent men up there to go to work. I sent them about March 8th or 9th. The lease was signed by Magruder that day; I think it was March 2d or 3d. I sent up about ten or fifteen men about March 8th or 9th.

Q. At the time you entered into the lease, did you talk to Mr. Magruder about pumping?

A. Yes, I talked to him about pump, soon I need the water, and he left some water for me to use. [89]

Q. I didn't understand that.

A. I talked to him about pumping water, is there plenty of water, you have to pump him up.

Mr. CORLISS.—Now, if the Court please, the witness has got to the point where I shall insist upon the objection. I object to evidence of any statement made by Mr. Magruder or anybody else on behalf of the Columbia Agricultural Co., in regard to an obligation to pump, or a promise to pump, on the ground that the contract covers the whole subject, and it is an attempt to add to or vary the terms of a written instrument.

The COURT.—What is the object?

Mr. RANKIN.—The object is to show the negotiations that were entered into at that time, and the understanding that this plaintiff had with respect to the very things that are involved in the lawsuit, that is, whether or not they were to pump.

COURT.—Well, you don't expect to add to the contract by this testimony?

Mr. RANKIN.—Not a particle. It is just disclos-

(Testimony of Seid Pak Sing.)

ing the understanding this man had at the time it was entered into. The contract does not say that they won't pump. I don't see that that is varying the terms of the contract. There is a legal obligation on them to pump.

COURT.—I suppose the Court will be called upon to construe that contract?

Mr. RANKIN.—Yes, undoubtedly, your Honor.

COURT.—And that contract will be construed by taking it by the four corners, and it cannot be helped by any outside testimony.

Mr. RANKIN.—That will be for the Court.

COURT.—That is your understanding of the law.

Mr. RANKIN.—Yes, your Honor, it is.

COURT.—Then, of course, any testimony concerning the meaning of that contract would not be pertinent, would not be competent. [90]

The men I sent up in March were Chinese. There was the bookkeeper and the foreman, besides the laborers. I first came up myself near the end of June, 1917, and stayed nearly three weeks. I saw the boys, how they planted the potatoes, how they were going to work, and sometimes I came and helped a little while—cut potato seed or something. The laborers worked pretty good—pretty hard while I was there. They started in planting a few days before I go up there. They had just about finished planting when I left to go home. They planted potatoes on the Magruder District first at that time when I had not yet come up. They were all planted in the Magruder District before I got up. When I come up

(Testimony of Seid Pak Sing.)

they were planting in the Midland District. I do not remember what tracts. I just saw the boys go to work, that is all. That time I came up and went to Mr. Magruder's office on the wharf there. He got a little office at Clatskanie, on the river. Then I ask Mr. Magruder how about the land, and ask him why he keep no more land for our planting potatoes, and he said, "You want some more?" and I said "Yes," so next day morning he come along from the China camp and take me down to look all over the land. and he show me what piece and I go to select. This was in the Midland District. He show me Lots 66 and 67 first, and I just walk along—all stump, all brush, and lots of needles, that stick. Then I say, "I refuse these two pieces—you see all stump and all brush, and all that kind of trees." I say, "I don't want lots 66 and 67," and he say, "All right," and he take me to Lot 80, and he say, "You want to take this piece?" I say, "No, I don't think so." He show me about few acres in the middle clear, the whole side big tree and brush, stump too, and he show me Lot 79, just a few acre on the middle for these two pieces. We walk along this road—come over on this place—few acres of hay there, and all tree—all brush. There were few acres of hay in the middle; at side all brush all big trees and stumps. Then he showed me Lot 45. A few acres in the middle, and all side big tree and brush; and he came to what they call Big Slough. There he showed me three pieces, Lots 39, 38 and 37. All three [91] all brush, except on the middle a few acres; every tract—all the same—brush every

(Testimony of Seid Pak Sing.)

tract the same, only a few acres in the middle. And he show me that piece up by the Chinese, about three-quarters of a mile or pretty near a mile from the China house, and I say, "I no take." Lot 39, I think, was about a mile from the Chinese; I don't know. The reason I didn't accept that was it was so far from the Chinese, and besides all brush and tree and stump and everything there, you know. No use for a man to go pick up a few acres there; then he go other lot a few acre; that no good—nobody like it that way. One time when I come back I ask Mr. Magruder, I say, "Mr. Magruder, why you no give me this one (indicating 51 and 50)?" And he say that these two lots leased to someone else. Then I ask him, "Let me take Lots 61, 62, 63, 64 and 65," and he said some were sold and some were leased, except one island just across about here and here, that four or five lots. "One, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve, thirteen—just thirteen piece on one island thirteen piece all clear land." He never let me do that. That cleared land he leased to somebody else, and he sell to somebody else. The cleared land I got was Lots 54, 53, 52, 48, 49. "After this he showed me then all of that China house and horse barn and kitchen and all big tree, all big tree, all this island, all grass, the man he can walk, he can walk."

I didn't take that lot where the barns and houses were—no plant potatoes there—all big tree and stump there. I took just a little piece by the China house called garden—one or two acres there—that is all. I thing it was in Lot 31, but I don't remember. I

(Testimony of Seid Pak Sing.)

didn't get all the 400 acres I contracted for. Just only a few lot I take it. That is all. That is the way I asked Mr. Magruder give me 400 acres. I think I got a little over 110 acres in the Midland District. I didn't figure it; I pointed out the lots. I got about 115 acres. Mr. Magruder and I did not go over the Magruder District together. The reason why they didn't plant earlier in the Midland District was they get plenty of rain, plenty [92] snow—not good dry land yet. I think I went back to San Francisco about July 13th or 14th, and they finished planting potatoes at that time. I came up again about September 25th or 27th. Came up to look everything over. When I come up in September I was going to look over the Beaver District, how everything go—how about the land, he fix it to pump or not. I stay a couple of days at that time. I was to take over the land in the Beaver District January 1, 1918, and I came up to see about the land in that district. I saw Mr. Magruder at that time. He took me out and showed me the land in the Beaver District. We just talked for a little while about the next year's business; that is all. Just talked for select how much acre for each camp that I wanted on the Beaver District. At that time I wanted six camps each for 500 acres.

Q. Any adjustment at that time, rearranged anything about the Beaver District at that time?

A. No, I don't think so, at that time.

Q. How did the Midland District look at that time, the potatoes?

(Testimony of Seid Pak Sing.)

A. At that time they be little bit wet, but not much, I guess. I no remember.

I came up again about October 10th or the middle. At that time I talked with Mr. Magruder for him to put up the buildings on the Beaver District, and he said, "Yes," pretty soon he going to put up the building. I looked over the potatoes in the Midland District. They looked pretty good—pretty good crop. Then I measure one acre, pick up that time, pretty near 150 sack one acre. I wanted to try one acre how it would go. That acre had pretty near 150 sacks, 300 bushels.

Q. How was the weather then, Seid Pak Sing?

A. That weather pretty near same rain at that time. I told Mr. Magruder, I say, "I put lots of money there. You better keep up the pump. Will you care for that?" And Mr. Magruder, "Yes, yes, yes."

The reason why we were so late digging potatoes was that [93] they were not mature, not old enough, not ripe, Potatoes on good soil sometimes take 140 to 150 days to get ripe. It certainly have to be 130 days before they are ripe. They will grow that long. At the end of 130 days they are pretty good size.

Q. As compared with the final growth, are they about the same size at 130 days, about as large as they ever get to be?

A. Oh, sure, oh, little longer, more bigger, more bigger potato.

What I mean by good soil is very rich ground.

(Testimony of Seid Pak Sing.)

Good, rich ground make more potato, nice and smooth, and they keep longer—keep longer nice. In good soil and rich ground the potato will grow longer. I think those potatoes planted July 15th could be dug just about December 15. Stay four or five months there before I pick them.

The bookkeeper wrote me a letter saying how many men he needed, and I sent them up. I don't remember the day; I think about December I sent up the last gang of men. I had enough men there to take care of the potatoes and beans during the summer time and the harvest. The reason why I didn't have more men at the planting time was because at the time I came up he only gave me about 160 acres, not quite 200 acres. Then I didn't send so many men. If he had given me lots of land—good land, then I would send more men.

Q. Why didn't you have more men there in digging time when it comes time to dig?

A. In digging time I only got about 40 acre, 40-odd acre; no use to keep so much men. I can in few days, ten day, I can pick up men. I got 48 or 50 men there, no use put 200 or 300 men there after 40 or 50 acre; spends a lot of money.

I was there when the hay was cut. I saw my foreman and one fellow there cut the hay on Lots 45 and 46. I ask my foreman how much hay, and he say about 320 bales altogether. I got half and the man that baled the hay got half. I think there were about 15 [94] or 20 acres—just in the middle, you know, all brush and tree and stump—I think not over 20

(Testimony of Seid Pak Sing.)

acres in the middle. It was wild hay. I didn't sell any of this hay. I kept it for my horses.

I came up again in November, and went down there and talked with Mr. Magruder, to put up the buildings on the Beaver District. Every time I go up, I talk with him that way. The potatoes looked pretty good. It was raining a little at that time. Nothing else occurred at my trip in November. I came up again in December. My foreman, he send letter for me; he say the water come flood on the ranch. Then I come up that time and just looked that water—it looked like a river. I stay on the levee. Then I come back and asked Mr. Magruder, "What is the matter? You no pump the water. You let my potatoes get all drowned." Then he say, "Oh, just now no can help you." So I told him to call up Mr. Brix and Mr. Byerly. Mr. Brix was the president of the defendant, and Mr. Byerly was another officer of defendant. I talked with them in the Oregon Hotel in Portland, in my room. They say, "Well, just now we cannot help him." All potatoes drowned. Mr. Brix said to Mr. Magruder, "I put pump there; it cost me $10,000 to $20,000. Why you no keep up pump, pumping water?" Mr. Magruder made no reply. Then at that time I concelled the lease for 1918, the lease for the Beaver District. The time I was up in December was about December 20th or 25th, pretty near Christmas. I didn't see the Beaver District then. I never go back no more. I was down to Clatskanie one day, and come back to Portland, and stay four or five days, and went back to

(Testimony of Seid Pak Sing.)

San Francisco New Year. It was raining when I was up here; big rain; a little heavy.

Q. (Mr. RANKIN.) How about your men down there at that time, Seid Pak Sing? What became of them?

A. Why, that men he don't do nothing; he stay there. I have to pay [95] their wages.

Mr. CORLISS.—Just a moment right there. We object to that until we know what purpose this testimony about his paying the men wages was for. What part of the case does it relate to?

Mr. RANKIN.—It relates to the special damage in the second part of the first cause of action. We allege in the first cause of action the damage to the potatoes, and then we also include in that cause of action the expenses of maintaining the crew that was there at the time, paying them wages and board when there were no potatoes for them to harvest by reason of the conduct of the defendant company.

Mr. CORLISS.—In view of the statement of counsel, we object to the evidence on the ground it is not the proper measure of damages.

COURT.—As it has been alleged in the complaint, I will hear this testimony. If it becames material, the Court will instruct the jury about it.

Mr. CORLISS.—Yes, your Honor can take care of it. I wish to save an exception, though, to save the record.

COURT.— Very well.

Q. How many men there, Seid Pak Sing?

A. At that time I think about 48, between 50 men

(Testimony of Seid Pak Sing.)

pretty near, but I not count them.

COURT.—How many men?

A. About 48 or 50, including the foreman and bookkeeper. Forty-six laborers. I guaranteed them $40 a month whether they worked or not. I had to pay them $40 a month, and besides I had to pay for their board, and that cost me about fifty cents a day for each man.

I never raised potatoes myself, but I have farmed about eight or nine years. I think it would have taken the men about ten or fourteen days to dig the potatoes that were flooded. I did not talk about damages in the Oregon Hotel at that [96] time when I was here in December. I just talked to Mr. Magruder, Mr. Brix and Mr. Byerly. I say, "What for you didn't pump the water and make my potatoes all drowned," that is all. I wrote a letter to the defendant after I went back to San Francisco. Plaintiff's Exhibit "8" is that letter. The same was offered in evidence by plaintiff and received without objection, except that counsel for defendant stated that defendant did not concede that self-serving statements in the letter could be taken as proof of the facts contained in such statements. The letter is as follows:

Marked "Plaintiff's Exhibit 8."

Plaintiff's Exhibit No. 8.

"#762 Sacramento Street,
San Francisco, California.
January 5, 1918.

Columbia Agricultural Co.,
Clatskanie, Columbia County,
Oregon.
Attention Mr. R. B. Magruder.

Gentlemen:

In view of your failure to keep and perform the terms and conditions of the lease made and entered into by ourselves on the 2nd day of March, 1917, and by which you were required to build certain buildings and to perform certain other work, none of which have been built or performed by you, I am compelled to notify you of my cancellation of such lease. I have heretofore verbally given you notice of such cancellation, which was agreed to by you, and I shall be obliged if you will consider this as a confirmation of the same, and write me a letter accordingly.

As I have previously advised you, by your failure to pump the water off of approximately from 45 to 50 acres of land covered by the lease, and on which I had planted potatoes, such crop was completely ruined so that I was unable to obtain any returns whatsoever from that portion, and have been damaged over the sum of [97] Ten Thousand Dollars ($10,000.00). I shall be glad to submit figures in proof of this at any time you desire, and would request that you take this matter up at your early convenience.

(Testimony of Seid Pak Sing.)

The lease calls for Thirty-six hundred Dollars ($3600.00) rental for the year 1917, at the rate of Nine Dollars ($9.00) per acre for 400 acres, but inasmuch as you only turned over to me not quite 200 acres, the rental should not exceed Eighteen Hundred Dollars ($1800.00). You now have in your possession, Two Thousand Dollars ($2000.00) of my money, leaving a credit with you of Two Hundred Dollars ($200.00), which amount I shall be obliged if you will return to me.

Please be advised that this cancellation of the lease is not intended to cancel my right for damages against you, owing to your failure to keep the water off of the land above referred to, and that such right for damages is hereby fully reserved,

Very truly yours,

SEID PAK SING."

Q. Going back, Seid Pak Sing, to the Beaver District, after you had been up and talked with Mr. Magruder about fixing the camps in the Beaver District, what did you do next with respect to the Beaver District?

COURT.—Is there any use in going into the Beaver District?

Mr. RANKIN.—Yes, your Honor. We claim that after Seid Pak Sing had agreed with Mr. Magruder about the farming of the Beaver District and Mr. Magruder said he would build the houses out there, Mr. Seid Pak Sing returned to San Francisco and sent up a certain number of men for the particular purpose of preparing the Beaver District for the har-

(Testimony of Seid Pak Sing.)

vest for the coming year, and that he was damaged so much—I have forgotten the sum.

COURT.—What do you claim as to that?

Mr. RANKIN.—Then they sent the men up here, and Mr. Seid [98] Pak Sing incurred the expense, and when he found out later on that the land was not ready in the Beaver District, he cancelled the lease, and we claim we are entitled to damages for bringing up those men and returning them and for their keep while here.

COURT.—Is that included in your second cause of action?

Mr. RANKIN.—That is the second cause of action.

Mr. CORLISS.—In view of the statement of counsel, we object to any proof of such expenses on the ground that under the facts as developed by the witness in the case, such items could not be recovered from the defendant in this case by the plaintiff, for the reason that the contract was cancelled.

COURT.—Before the men were sent up?

Mr. CORLISS.—No, but after the men were sent up.

Mr. RANKIN.—That sum amounts to $895, your Honor.

COURT.—If he were forced to cancel that part of the contract by reason of the defendant's nonobservance of the contract, then perhaps he might have the right to recover that amount.

Mr. CORLISS.—We take an exception to your Honor's ruling.

COURT.—I am discussing it. I don't understand

(Testimony of Seid Pak Sing.)

it fully. The cancellation of the lease is based upon the alleged fact that the defendant failed and refused to turn over this tract, and that prior to the cancellation this expense was incurred. I will overrule the objection.

Mr. CORLISS.—Your Honor will allow us an exception.

Q. Now, Seid Pak Sing, to go back, did you see the Beaver District? A. Yes.

Q. Was it covered with water?

A. You mean what time?

Q. When you were there towards the last part.

A. Last part?

Q. Well, was it covered with water at any time? I don't know exactly [99] what time. Was it covered with water?

A. Yes, December after I come back.

Q. In December it was covered with water.

A. Yes.

Q. Now, with respect to the men, did you send any men up to improve the Beaver District?

A. Yes, sir.

Q. When did you send those?

A. I send that man, ten men come up for to start up, do something on the Beaver District, I think December 5th or 6th.

COURT.—That was 1917?

Mr. CORLISS.—So that I will not be interrupting, may it be understood that this line of testimony is all taken subject to the objection already made and exception allowed?

(Testimony of Seid Pak Sing.)

COURT.—Very well.

Q. The fact that the water was on the Beaver District, was that the reason you cancelled the proposed lease of Beaver District? A. Yes.

I sent up ten men in December, 1917, for the Beaver District. They had not put in pumps on the Beaver District so as to pump the water off the land and keep it dry. The land was not in a condition to cultivate at all, and that is the reason I cancelled the contract.

Q. With respect now to your damage concerning the Beaver District, what was the first thing, the first money you had to spend out, put out regarding the Beaver District?

A. I spent money just as I sent up ten men, sent them up to Beaver District, December 5th or 6th, 5th or 6th, that day in December.

Q. 5th or 6th of December, 1917? A. Yes.

Q. How did those men come up here?

A. They come, seven men come by the steamer.

Q. Seven men came by the steamer?

A. Three men come by the later train. [100]

Q. Three men came on the train? A. Yes.

Q. What did the fare of those men cost coming up by steamer, seven men?

A. I got paper mark it down. Seven men come by the steamer, $92.90.

Q. How about those men that came by train?

A. By train three men, fare $62.40.

Q. Was there anything else came up at that time?

A. Well, send the whole machinery, the plow and

(Testimony of Seid Pak Sing.)

wagon, and the China cooks, $44.55.

Q. $44.55, that covered freight on everything, plow, wagons, and things belonging to the Chinese who came up? A. Yes.

Q. You had to pay that? A. Yes.

Q. Now, was there anything else?

A. So plenty water and Mr. Magruder might finish at the building, nothing to show up, nothing ready.

Q. Buildings not built?

A. No built at that time. So lots of water and flood and all, we go back, all boys went back to San Francisco.

Q. Any expense to you?

A. Then pay for some of the men go to Astoria steamer.

Q. This time that you were speaking about, is 1917?

A. No, this is 1918. In January they go back.

Q. That is when you sent the men back?

A. Yes. Cancel the lease in December.

Q. What time did they come up?

A. December 5th or 6th.

Q. Were they all up here when you cancelled the lease? A. Yes.

Q. Then you sent them back to San Francisco?

A. Yes. [101]

Q. How much did it cost to send them back to San Francisco?

A. Cost seven men by the steamer, $92.90, and the three men the railroad fare $62.40, and altogether at

(Testimony of Seid Pak Sing.)

that time he come up December 5th until 1918, January, on the board feeding them, the labor, you know, $141.50.

Q. For ten men?

A. Yes, for ten men pretty near a month.

Q. That is a little over a month, about a month and twelve days for ten men's board? A. Yes.

Q. $141.50? A. Yes.

Q. Now, any other expenses on the Beaver District?

A. Well, Beaver District I send one foreman come up, pick out the land and take care of the place, a foreman named Lee Fook.

Q. What was he to do with the Beaver District?

A. He come up to tell Mr. Magruder and fix some building and fix some other thing, levee for the next year.

Q. When did he come up?

A. 1917, September 25th.

Q. September 25, 1917? A. Yes.

Q. Did he come up under the lease to take charge of that district, and see it prepared for the next year's crop? A. Yes.

Q. How much did he cost you?

A. Altogether cost come up and return back, cost $203.

Q. $203? A. Yes.

Q. Any other expense with the Magruger District? A. No, Beaver District.

Q. Beaver District, yes; pardon me.

(Testimony of Seid Pak Sing.)

A. Beaver District I send one man named Mr. Bak Hoo.

Q. What was he to do up here? [102]

A. Then he come up for to tell Mr. Magruder for to scrape out each camp, 500 acre each camp, put on the map, tell him put up the building each camp.

Q. How many camps? A. Six camps.

Q. Six camps? A. Yes.

Q. He came up to see about the planting and construction of the six camps?

A. Yes, tell Mr. Magruder put up the building, house, barn, kitchen, everything ready for next year at that time.

Q. How much did Bak Hoo cost?

A. In November 3, 1917, come up $85.00.

Q. Any other expense?

A. At that time he come, bring ten men come together.

Q. He came with the ten men?

A. Yes, you see because I need four or five foremen, you see, and Bak Hoo he come up December.

Q. The same Bak Hoo who came up as foreman with the ten men?

A. Yes, he come by the train other fellow come by the boat.

Q. The other fellows came by the boat, he came by the train? A. Yes.

Q. How much did he cost?

A. December 2d he keep my money $107.

Q. That is altogether how much for that Beaver District, how much altogether?

(Testimony of Seid Pak Sing.)

A. About eight hundred odd dollars.

Q. $891.65, is that it? A. Yes.

Q. It is alleged in the complaint as $895.

A. $891.65.

I have not been paid any of this money I paid out. Sing Kee Co. is the name I do business in. [103]

Witness is shown Plaintiff's Exhibit 9, and testified that he signed and wrote this letter to defendant. It is as follows:

Plaintiff's Exhibit No. 9.

"SING KEE COMPANY,
General Merchandise,
762 Sacramento Street.
San Francisco, Cal., Dec. 19, 1917.

Mr. R. B. Magruder,
c/o Columbia Agricultural Co.,
Clatskanie, Ore.

Dear Sir:

Please take notice that water must be pumped out of the land as it interferes greatly with the growth of vegetables. The land must be drained dry, and also please rush quickly building all the houses and barns. My foreman send me letters to have work done at once. Kindly attend to this matter as soon as possible. Please advise.

Yours very truly,
SING KEE CO."

I wrote that letter because my foreman wrote long letter to me saying water pretty near drown the potatoes.

(Testimony of Seid Pak Sing.)

Q. Now, later on you didn't like 3,000 acres?

A. Because everything not ready. I told him too late.

Q. Tell about that. You proposed how much then to take?

A. That time, one time I say, if you build house and fix some other thing, levee, before January, 1918, then I can handle altogether 3,000 acres. If not, I think maybe not less than 2,000 acres. I say so. I told Mr. Magruder that way. I write letter too one time.

This letter I wrote November 17, 1917. In it I said I would take 1,500 acres. The reason why:

A. Because you see at that time not ready for the house, and nothing show up, no put the pump in; nothing. He not make the ditch on the land, you see, because then I wire told Mr. Magruder all the time I [104] say, "Well, you ought to put up the building first, then I have to send my men up right away, because if it ready, I can take so much land." At that time he went away east. He didn't answer me. I very willing to take 3,000 acres but no, nothing show up, no buildings, no pump, no cut ditch in; all wet.

About November 17, 1917, I sent Mr. Magruder at Clatskanie, Oregon, the following telegram:

"When I send you my letter dated November 13, I was promised by various parties to take up the whole 3,000 acres. Some of them have backed out. I now judge that I can only be able to cultivate about 1500 acres coming year. Will you please imme-

(Testimony of Seid Pak Sing.)

diately call a directors' meeting to sanction me to cultivate 1500 acres coming year. I am now exerting my utmost effort to get more parties to farm balance. I will have about 150 persons coming up to the ranch soon. Please reserve the houses as requested. Please telegraph me the decision of your directors' meeting immediately. Please write me as soon as possible about the size of machines.

Yours very truly,

SING KEE & CO."

I don't think he wired me telling me to take less than 1500 acres.

Q. Were you still discussing that in December, when you were up here, met in the Oregon Hotel, with Mr. Brix and Mr. Magruder?

A. No, at that time cancel. I don't want it—refuse.

Q. They hadn't said whether they would take less, or whether they would let you have less than 3,000 acres up to that time? Never answered it.

A. No. He answered me, he said that is all right. Mr. Byerely, he say, "Oh, that is all right." That is the way he answered me. I think that was December 26th or 27th.

Cross-examination.

About December 26th or 27th I saw Mr. Magruder, Mr. Brix and Mr. Byerly at the Hotel Oregon, in Portland; that was the time [105] I say that I was going to cancel the lease. All three of those men agreed with me to cancel the lease at that time on the Beaver District. They said, "That is all

(Testimony of Seid Pak Sing.)

right," to cancel the lease—"wipe it out entirely." I told them I canceled it because the land was flooded on the Beaver District and besides no good weather up here; besides nothing show up, you no get buildings, no everything ready. At this time I didn't say anything to these men about my claiming damages for these men that came up here on the Beaver District. I just ask them why they didn't pump, that is all. I didn't mention any damages to potatoes at that time or any other damages of any kind. The three men agreed with me to cancel the lease on the Beaver District; that said, "That is all right. I told them that I would quit them so far as the Beaver District was concerned, and they agreed to it, said it was all right.

Defendant offered in evidence telegram dated November 17, 1917, sent by Sing Kee Co. to Magruder, being the telegram testified to by the witness who in his testimony gave the exact words of the telegram. The witness could not tell whether he sent this telegram November 17th or 19th.

I think 10 or 12 men could dig an acre of potatoes in a day, but this would depend on the crop—big crop it would take more men—small crop less men. If big crop it might take 15 or 20 men to dig an acre in a day. A good digger can dig 10 or 12 sacks in a day.

I made the contract in March, and the first I came to Clatskanie was in June, 1917. At that time there was some water, a little bit on this land. The water in the ditch—in the slough.

(Testimony of Seid Pak Sing.)

Q. Was there any water on any of that land that you could farm?

A. Yes, got some water on the ditch, yes, see.

Q. In the ditch? A. Yes.

Q. But I mean on the land that was there to be cultivated, to be cropped, was there any water on any of that land?

A. You mean on top of the ground?

Q. Yes. [106]

A. No, there wasn't water on the top.

Q. The land was in good condition?

A. Yes, at that time very good?

Q. Wasn't it dry on the top?

A. Yes, it was dry.

Q. Then, the reason why you didn't take any more of this land when you had this talk with Mr. Magruder was not because it was wet, was it?

A. No, at that time he not talk. At that time he didn't talk to me anything.

I didn't take this land in the Midland District because it was not cleared land; I could not cultivate it. But I no say it wet at that time. I no say it was wet.

Q. In the Magruder District, why didn't you take all of the clear land in the Magruder District?

A. At that time all the men he move on the Midland District, you see.

I didn't take the land because the laborers had gone over into the Midland District. When I was therein June, Mr. Magruder did not show me anything. I went over to the Magruder District by my-

(Testimony of Seid Pak Sing.)

self. I think I took about 40 acres in the Magruder District.

Q. And there was a good deal more cleared land in the Magruder District, wasn't there?

A. Yes, got some more, but some stump, some brush.

I didn't measure the amount of cleared land in the Magruder District. I do not know anything about it.

Q. Isn't it a fact that in the Magruder District there was 145 acres of cleared land that you could have taken?

A. Well, because that first time, March, come up there, that time, and all wet, he not fix ditches and no dry; how can you raise potatoes? He not fix ground, not fix nothing, you can't plant potato.

I went over the Magruder District in June to see how the crop looked. I did not go over all of it—just the part we planted potatoes on. [107]

Q. Isn't it a fact there was 145 acres of land in the Magruder District that you could have taken out some time in 1917?

A. I didn't catch him? (Interpreter explains.)

A. No, no. I know about that. Mr. Magruder never said word to me at that time I came up. He just show me in the Midland District, that is all.

I did not see any wet land in the Magruder District while I was there in June at all on the surface. I didn't walk much—just walk on the piece of land where I plant potatoes.

Q. Don't you know with your eyesight you can

(Testimony of Seid Pak Sing.)

sweep over that district and see a lot of land without going over it? A. No, not all.

Q. You can't see it? A. Yes, I see it.

Q. Was there any water on any of that land?

A. I think so, sure.

Q. Where? A. Away far on the land.

Q. Well, do you mean in the drainage ditch, or on the land that was to be farmed?

A. I didn't walk much on that place, but not my business, you see, I not want to walk far. I not want to walk far.

Q. Do you wish the jury to understand that on the Magruder District you saw some land there, some of the cleared land that was wet on the surface or had water on it anywhere?

A. No, I can't answer this. I no understand. (Interpreter explains.) No. I didn't say there was any water.

Q. Did you at any time you were there on that trip in June tell Mr. Magruder that you would not take any more land in the Magruder District except the land you put in crop?

A. I can't take it. (Interpreter explains.) No. At that time I come up here I asked Mr. Magruder get more land, I plant potato. I want to [108] make money.

Q. Did you ask him for more land in the Magruder District?

A. No, not Magruder District. Midland District at that time we finish up Magruder District, the job, he finish, all men you have in the Midland District.

(Testimony of Seid Pak Sing.)

Q. You knew, didn't you, that under the contract, after Mr. Magruder or the company had turned over the cleared land to you it was your duty to select the land you wanted and notify them of your selection? Didn't you know that?

A. Yes, but Mr. Magruder he didn't show it to me. I asked him give me more land, why, he no tell me to select for some Magruder District. He show me on the Midland District.

Q. Didn't you know Mr Magruder had already showed Wak this land in Magruder District when he first came there?

A. I didn't know. I didn't know.

Q. Did you expect that Mr. Magruder was going to be kept in the dark all through that season and have those lands all tied up and you not tell him what land you were going to take in the Magruder District? Is that what you thought? (Interpreter tries to explain.)

Q. I will simplify the question. Didn't you suppose that Mr. Magruder had told your foreman what land in the Magruder District he could take? Didn't you think that was so?

A. Mr. Magruder told my foreman?

Q. Yes, before you came up?

A. I think I suppose he told him at that time, but I no think so he take that bad land. I think he want to get that dry land, and get the clear land.

Q. Well, you know when you came up that Mr. Magruder had already told your foreman that he

(Testimony of Seid Pak Sing.)

could have the cleared land in the Magruder District, didn't you?

A. Not the Magruder District he didn't tell me.

Q. But you knew that Mr. Magruder had told your foreman that he could [109] have any of that cleared land, didn't you?

A. No, he didn't tell me. I don't know.

I sent a foreman up to farm the land. I didn't come *up* up until the last of June. My foreman picked out the land, and I think I know that Mr. Magruder would have to tell him what land in the Magruder District he could have. When I came up here I didn't ask Mr. Magruder for more land in the Magruder District. I asked him to give me more land in the Midland District. I didn't know what district he showed me, but I asked Mr. Magruder to give me more land, that is all.

Q. Did you tell Mr. Magruder that you could not get money enough to put in all of the 3,000 acres in the Beaver District? A. Yes, sir.

Q. And when was that?

A. I think that time end of September, end of September, or October first part, I think. I not remember the date, but I remember one time.

Q. And did you say that to Mr. Brix and the other man too, or just to Mr. Magruder?

A. First time I talked with Mr. Magruder, then I say next year 3,000 acres. Of course, we need pretty near $300,000 before I can handle. I ask him let me have some money, and he say, "Yes, I think maybe I call up director meeting," I think he

(Testimony of Seid Pak Sing.)

help me out. So next day then he call up all of his gentlemen director a meeting down at his office, and that time he ask me how much I want. And I say, "Well, I think next year 3,000 acres, then I think it cost me $300,000, and because I want you to help me out about $40,000 or $50,000, then I think it will be enough." So all director in meeting and he say, ask me, "How much interest you pay?" And I say, "Well, just what you gentlemen say so." And he say, "Well, six per cent." I say all right. And after he told me, he says, "Well, all right, you start one camp first, and each camp I help you [110] out $8,000 each camp." That is the way then all would be. Then I go back to San Francisco, and hire, pick up all of my men ready for the next year.

Q. Now, you think that was in October, you say?

A. I think about end of September, first part of October, I think that time. I forget about that, but I think about that time.

Q. That is, you told him you didn't think you would have money enough to put in the 3,000 acres, unless they gave you some help?

A. Yes, unless they gave me about forty or fifty thousand dollars. It cost me $300,000, you know. That is lots of money.

Q. You bet it is. Now, this telegram of November 17th, you sent to Mr. Magruder says that you have been promised by different parties to take up the whole of 3,000 acres; some of them backed out; and that you thought you could not cultivate more than 1500 acres. Now, wasn't that the first time

(Testimony of Seid Pak Sing.)

you ever talked about the 1500 acres, when you sent this telegram? A. No, not first time.

Q. Not the first time?

A. No. I very willing to take 3,000 acres all the time I talk with Mr. Magruder.

Q. Then you went back home after you had this talk in October?

A. Yes, then in October I go back, I pick up my men all right for the 3,000 acres. And after some my men should hear from somebody say so, but I don't know, my men he say everything house not ready, and no ditch in, and no pump in, nothing show up, then some of my men he say, "Oh, maybe he no finish at that time house and ditch and pump."

Q. Well, now, in this telegram you say you want directors to sanction you to cultivate 1,500 acres. Did the directors ever change the contract at all?

A. No; no, not change it. [111]

Q. They wouldn't agree to that?

A. No, not agree; but I didn't hear anything, though.

Q. Do you know whether they put up one of these buildings on the Beaver District, one of these sets of buildings? A. Yes.

Q. They did one?

A. Yes. About that time I think pretty near January 1, 1918. I come up December or Christmas, at that time he have no house and no nothing. Then I go and ask Mr. Magruder, I say, "Why you no put up building?" And he say, "Oh, too much rain, and can't hire the carpenter." That time I go

(Testimony of Seid Pak Sing.)

back and not put up the building yet.

Q. Was that the time you cancelled the contract?

A. What?

Q. When Mr. Magruder said that he could not put up buildings because it was too wet, was that the time you cancelled the contract?

A. Yes, after I come up to Portland and talk together, then I cancelled that time.

I think my men planted potatoes on Lot 54; there were no stumps or brush on that lot. Mr. Magruder show me when I was up in June Lot 53. That lot was cleared. My foreman selected that lot. He show me Lot 52. My men had planted crop on that lot. There was no stumps or brush there. It was clear.

Q. Now, did Mr. Magruder at that time show you this Lot 29 right across the main ditch from Lot 54?

A. No, I don't think so, Mr. Magruder show me that two or three lot on the levee that side, I don't think so, that side the levee.

Q. By that you mean Lots 29, 30 and 31, don't you? You don't think he showed you those three lots? A. No, I don't think so.

Q. Had anything been planted on those lots?

A. No.

Q. Was there any shrub, any brush or stumps on Lot 29?

A. Yes, I walked over there, that two or three lot all big trees and big brush, brush and stump, yes. [112]

Q. Do you wish the jury to understand that Lot

(Testimony of Seid Pak Sing.)

29 was all brush and stumps?

A. I saw over there, yes.

Q. Did you go on the land itself?

A. Because I walk there but I didn't remember how about the check, you see, I understand the check.

Q. I want to be fair to you. A. I know.

Q. I will take these three lots together, Lots 29, 30 and 31. Did you walk over these lots?

A. I walked China house and walk away up here and look around there, all plenty of tree and plenty of brush.

Q. That is, you didn't walk on the lots, but you walked along the levee which runs along the side of the lots? A. Walk along the levee here.

Q. And you could see the lots from where you walked? A. Yes, I could see the lots.

Q. Now, was there any cleared land on any of these three lots?

A. One or two acre on the middle, I think, maybe one or two acre, but I don't know. Some little bit there inside.

Q. Now, you mean one or two acres cleared on each one of these lots, or on all three of them?

A. Yes, on the inside.

Q. Might have been one or two acres cleared inside on each of the lots, is that it?

A. I don't know which lot. I look about so far, you see. I don't remember how much lot.

Q. Was there more than one cleared space there on those three lots, or just one cleared space? Can you tell?

(Testimony of Seid Pak Sing.)

A. I don't understand how about the lot, about the lot, you know.

Q. No, I don't ask you any particular lot, but take all three of the lots, was there more than one cleared space on those three lots? [113] A. Well, some.

Q. More than one?

A. Some little bit every check.

Q. A little bit every lot. I see.

A. I think so.

Q. Could you tell us about how much was cleared of those lots? A. I can't say.

Q. As much as five acres on all three of the lots?

A. I couldn't say how much acre cleared land.

Q. Well, you have been familiar with farming land, haven't you?

A. Yes, I have farmed, but I didn't—

Q. Well, then, you can judge with your eye, can't you, about what an acre of land is from your experience? A. I don't know answer that.

Q. Couldn't you tell whether there were two acres of cleared land there or twenty?

A. Maybe two or three acre, I think.

Q. Would you say there were not as many as twenty acres of cleared land on these three lots 29, 30 and 31, altogether, I mean?

A. I think not all three lots. I think about three or four acre. I don't know. I don't know how wide. About few acre, I think, I suppose.

Q. Might have been three or four acres on each one of them, or on all of them?

A. Well, I think all three piece four of five acre,

(Testimony of Seid Pak Sing.)

two or three acre, I don't know.

Q. You think there were not over four or five acres on all three pieces? A. I think so.

Q. Or on each piece?

A. On all of the three pieces.

Q. This cleared land that you saw there, did that have any brush or [114] stumps on it the cleared land itself, or was it all cleared?

A. No, some stumps some place.

Q. On the cleared land?

A. No, not cleared land, on check.

Q. But where the land was cleared, that did not have any shrubs on it, did it, or any brush or stumps on it?

A. No, it didn't on the middle, got little bit on the middle there.

Q. So you think that there were not over five acres *of cleared* on these three lots? A. I guess so.

Q. Not over that? But when you went along there, did you try to measure the amount of acreage with your eyes at all? A. No, sir.

Q. Just looked at it and went on? A. Yes.

Q. Now, I call your attention to another lot. Did Mr. Magruder show you Lot 49? A. Yes.

Q. Was there some crop on that? A. Yes, sir.

Q. There were potatoes on that, weren't there?

A. Yes, sir.

Q. Was there any brush or stumps on 49?

A. Yes, sir.

Q. Where was it?

(Testimony of Seid Pak Sing.)

A. Pretty near little bit on that slough, a little bit along the slough.

Q. That is, a little brush and trees right near the drainage ditch, is that it? A. Yes.

Q. The big drainage ditch? A. Yes.

Q. There wasn't much there, was there?

A. Not much.

Q. Just right close to the ditch?

A. I think about couple of acre, about acre, I think.

Q. About an acre? A. About an acre. [115]

Q. And the rest of it was all cleared land, was it?

A. Yes.

Q. Good land? A. Yes.

Q. Did Mr. Magruder also show you this next lot 48? A. No not 48, two lots.

Q. No, I mean the number of the lot, lot No. 48?

A. Yes, that is right.

Q. He showed you that, did he? A. Yes, sir.

Q. Was that potato crop? A. Yes, sir.

Q. Did you see any brush or stumps on this Lot 28?

A. Yes, sir, just about a couple of acre on slough side, up here fence (pointing to the upper part of the lot).

Q. Now, you say there were about two acres of brush and stumps down toward the main drainage ditch? A. Yes.

Q. Right close to it, wasn't it? A. Yes.

Q. Now, would you be sure there was as much as two acres there?

(Testimony of Seid Pak Sing.)

A. Well, but I just guessed, that is all.

Q. You didn't go into the brush, did you, to measure it at all? A. No, you can't walk in.

Q. You just made a guess at it? A. Yes.

Q. I see. And you also say there was a lot of brush up near the fence? A. Yes.

Q. And that ran along the other big drainage canal, didn't it?

A. No, it is fence. This fence along there.

Q. Up along the fence? A. Yes, sir

Q. That is on the north? That is the other end of Lot 48 there was a fence? A. Yes.

Q. And along that fence there was a little—

A. A little stump; just little stump.

Q. Just stumps? A. Yes.

Q. Was there much of that in stumps?

A. Yes, a good deal. [116]

Q. How many acres would you say?

A. I think, well, just altogether that piece about two or three acres down here, about two or three acres up here.

Q. You think there was about two or three acres in stumps there?

A. Two or three acres there (pointing to Lots 47 and 48), some little bit here too.

Q. We will keep Lot 47 out of this at present. How much brush was there along the fence there on Lot 48, would you say?

A. Oh, I think down here (pointing towards a slough). About two acre, 48 lot, and up there I think about an acre. I think about that much.

(Testimony of Seid Pak Sing.)

Q. About an acre up by the fence?

A. Yes, this one.

Q. Just a moment; we will come to it. Did you go on this piece of stump land up by the fence there to make a measurement of it at all with your eye?

A. No, sir.

Q. You just kind of guessed at it? A. Yes.

Q. Now, did Mr. Magruder show you this lot down here, 39? A. Yes, sir, he showed me.

Q. And was there any cleared land on that?

A. Some; not much.

Q. Could you give us your judgment as to how much there was there?

A. Well, I think, I not think so half cleared land.

Q. Do you think there was as much as 20 acres of cleared land on it?

A. I think so, 18 or 20. I don't know. But I think it looked this piece, because I not remember what check, you know, Mr. Magruder he just take me walk along, but I never remember what check.

Q. Maybe it would be fairer to you then, to take these three lots together. I want to be perfectly fair to you. Well, now let us take these three lots together, 38, 39 and 37. Did he show you these three lots there? A. Yes, I think he showed me.

Q. You have an idea where they are, don't you? [117]

A. Because Mr. Magruder he show me just walk along, but he didn't tell me what check. He not bring the map. He not bring the map, he just show me, "this piece and this piece."

(Testimony of Seid Pak Sing.)

Q. Then we will take this altogether here. He showed you this land in here, didn't he, 39, 38 and 37? A. Yes.

Q. How much cleared land was there on those three lots together there, in your best judgment?

A. I don't know. I don't know. I think some, but at that time he show me some clear land and some plenty stump, and plenty brush, because that piece between China house pretty near three-quarter mile, and one mile, too far away, and I no take it.

Q. Well, of course, we will take up the distance later on, but I am now inquiring as to the fact as to how much was cleared. Can you give us an idea on this piece right in here how much clear land there was? A. Well, I don't know.

Q. Was there 50 acres in there of cleared land?

A. I don't know. At that time I don't know how much is cleared land, but I no guess, but I talk to Mr. Magruder, I say, "This piece of land too far away from China house, and lots of stump, lots of brush." I say, "I don't want to take that." He said all right. Then we walked away again. I didn't pay much attention that time.

Q. The reason why you didn't take it was because it was too far away from the China house?

A. Yes, too far away, and then you have lots of stump, lots of brush, because man like to get clear land, work right along, you know.

Q. Yes, I know undoubtedly you would like it, of course. Can you tell me how much of brush and stump land there was on those three lots?

(Testimony of Seid Pak Sing.)

A. I think a few acre every piece, I think, I guess. [118]

Q. A few acres of what?

A. A few acres each check.

Q. A few acres of brush or cleared land.

A. Clear.

Q. Only a few acres of clear land? A. Yes.

Q. Will it be as much as fifty altogether in the three pieces?

A. I don't know. I didn't say how much.

Q. You can't tell, can you?

A. No, I can't tell.

Q. You didn't try to measure the number of acres on those three pieces that were cleared at that time?

A. No.

Q. You were not interested in the number of acres of cleared land there, were you? You were interested in that fact that it was so far from the China house?

A. Well, some away far, and some brush and stump there. Chinamen pretty hard work; he can't work, you see.

Q. Now, according to this map which is already in evidence, there were about 127 acres on those three lots. Would you think that half of that was cleared?

A. No, I don't think so.

Q. Not half. Well, would you think that out of the 127 acres there were 40 acres cleared?

A. Well, maybe about twenty and twenty, I think. I don't know.

Q. You wouldn't think over thirty?

(Testimony of Seid Pak Sing.)

A. I think not quite thirty and forty acres, but I think so.

Q. Did you mean to say you thought it was thirty or forty or not thirty or forty?

A. I think so. I think about thirty and forty.

COURT.—Could he tell the proportion of the cleared and uncleared?

Q. I will ask him that. Would you think it was one-third cleared? You know what one-third means, don't you? A. Yes, I think so. [119]

Q. You think one-third was cleared?

A. I think about forty; thirty between forty, I guess. Of course I don't know. I can't answer, Judge.

Q. I know you want to be fair. A. Yes.

Q. Now, can you tell use where this brush and stumps was whether it was right along in the center?

A. It is on the center, two sides.

Q. Now, can you tell where this brush and stumps were on these three lots here? 39, 37 and 38.

A. I think all stump and brush alongside of the levee there (pointing to the lower part of the lots), Lots of brush and big tree, and on the big slough there.

Q. That is along the main ditch?

A. Yes, that is called slough, main ditch, main slough.

Q. We mean the same thing, only use a different word, that is all.

A. And some just on the edge; every piece every

(Testimony of Seid Pak Sing.)

check, and some little clear in the middle; clear land in the middle.

Q. Now, taking these lots here, because it is easier for you to handle them all together, Lots 35 and 34, these two lots in here?

A. I think that two-piece Mr. Magruder didn't show me. He didn't show me, Mr. Magruder didn't show me.

Q. Well, did you see this land in here where 34 and 35 are as you went along the levees?

A. Went along the levee, yes.

Q. Have you any idea at all how much of that land was clear along there?

A. No, I didn't pay any attention to it.

Q. You don't know how much of it was in brush or stumps, do you?

A. Yes, all, pretty near all has some stump; every piece, just except for here, except for here, that three piece here clear land, that is all. [120]

Q. Would you say that half of that in there was brush and stumps? A. No.

Q. You can't tell? A. No.

Q. Now, here is the pump. I will ask you whether Mr. Magruder showed you this land in here, Lots 45 and 46? A. Yes, that two-piece there.

Q. And was there any brush on that land?

A. Yes, sir.

Q. Just tell where it was.

A. All brush on the main canal, and all up here on the fence.

Q. Along the fence? A. Yes.

(Testimony of Seid Pak Sing.)

Q. That is, there was brush all along the side of the main canal, and there was also brush up along the fence? A. Yes.

Q. Up at the top there?

A. Yes, and just in the middle a few acre, a few acre in the middle, kind of hay there.

Q. Now, this map indicates that there were about 62 acres, a little over, in those two lots. Could you tell how much of that was cleared, whether half of one-third, or what?

A. Yes, I think these two pieces, I think, maybe. Let's see. Maybe about 20-acre clear. I cut the hay. As soon as we get the hay there, I cut him.

Q. Only about 20-acres clear out of the 62, you think? A. Yes.

Q. You think the rest was brush and stumps?

A. Yes.

Q. You didn't try to measure it, did you?

A. No, no, no.

Q. Did you cut hay from any other part of this land except these two?

A. No, just only those two pieces.

Q. Do you know how much hay you got off these two pieces?

A. At that time I think I cut about 320 bale they call—bunch, bale, I think.

Q. About how much a bale, do you remember what they weigh?

A. Well, I think, I don't know—I hear that man he say about 125 or 130 [121] some 140.

Q. I see. All right. Now, we go on the other

(Testimony of Seid Pak Sing.)

side of that fence, see (referring to map), 79 and 80, between the fence and other main ditch there, you see. Did he show you that land?

A. No, I forgot about that too. I don't think so.

Q. Was there any brush on that land at all?

A. Yes; sir.

Q. In here?

A. This fence, and go over there all brush, all brush, and just on the middle, some piece on the middle.

Q. I am going to let you tell us how much cleared land you found in here. The acreage there is about 64 acres in there (pointing to 79 and 80). How much of that was brush and how much clear?

A. I just walked in there, but I don't remember that.

Q. You couldn't remember. If you gave us an idea of the clear land there, it would be just a guess, wouldn't it?

A. No, at that time I didn't pay any attention for that. I not remember.

Q. Did he show you this land up here in Lots 66 and 67? A. Yes.

Q. And was there any brush on that?

A. Yes, all stump. Very little brush, but all stump, all that time, some tree, little, you know, I can walk stick inside, you know.

Q. Oh, you mean these thistles?

A. Yes, all thistles, big stump, yes.

Q. And where were the bit stumps?

A. All over.

(Testimony of Seid Pak Sing.)

Q. All over the land?

A. All over, a little further about ten feet, four or five feet; some twenty feet there was.

Q. What was on that land—hay? A. Nothing.

Q. Nothing on it. Nothing growing on it at all.

A. Just only stump.

Q. Just only stump? [122]

A. And the thistle.

Q. Were the stumps so thick you couldn't plow in there? A. No, couldn't do it.

Q. Couldn't plow in there? A. No.

Q. Was there any cleared land at all on those two?

A. No.

Q. None at all? A. No.

Q. No land that you could cultivate at all?

A. Can't do it.

Q. Why not?

A. Well, because there were lots of big stump there, ten feet wide, ten feet wide you get one stump, and five feet, and maybe twenty feet one stump. How can you go to work?

Q. These stumps you claim were all over this land here? A. Yes.

Q. Don't you know that Mr. Magruder figured out, deducted or took out this land that was not cleared and didn't ask you to take the land that was not cleared, but he asked you to take the cleared land.

A. No, that time, yes, he tell me take the cleared land, but a few acre in one piece, few acre one piece, then another, see because no good.

(Testimony of Seid Pak Sing.)

When I was up there in October, 1917, I told Mr. Magruder I was not going to pay rent for the 400 acres, because I did not get it. There was no one present except Mr. Magruder and myself. I didn't say much. I say only just he give me not quite 200 acre, and I can't pay 400 acre rent. I remember that the trust company that had this rent for collection wrote me about the 1st of August for the first installment of rent $720.00. I did not say by letter or word of mouth that I was not to pay $720.00 because I did not get the 400 acres.

Q. And didn't this company again write you about the first of September for the next installment of rent, $720?

A. No, I forget, they sent one time letter.

Q. You don't mean to say that they didn't write you every month for this rent, do you, the Trust company?

A. The Trust Company wrote me one letter. I think. [123]

Q. Do you wish to tell the jury that you got only one letter from the Trust Company, dunning you for this rent?

A. I forget about that. I forget one or two. I forget that.

Q. Isn't it a fact that you got five letters from the Trust Company asking you, about the time these five installments of rent were due, to pay the rent?

A. I don't know. I think maybe one or two times.

Q. Will you now say positively that you didn't get

(Testimony of Seid Pak Sing.)

five letters from the Trust Company, asking you to pay this rent?

A. I don't think so. I don't think so, I remember for to get five letters. I think maybe I got one or two. To be sure I think I got one or two, August, September, maybe two.

Q. In October—you never got any letter for the October rent? A. I don't think so.

Q. Will you swear that you did not?

A. Because I forget about that, you see.

Q. Will you swear?

A. Chinese bookkeper, you see, he say got letter, but I no keep him, you see. I no keep him.

Q. Will you swear you did not get any letter from the Trust Company about the first of November for the rent? A. I can't swear about that.

Q. You don't keep your letters?

A. No, I don't keep them.

Q. Would you want to say that you didn't get one for the December rent, the rent due December 1st, at all? Or that you don't remember?

A. No, I don't think so. I don't remember.

Q. You don't remember?

A. At that time every month I come up one time, come up here you know.

Q. Well, at any rate, as I understand you—I want to be fair to you—whatever letters you got about the rent you didn't write back that you didn't owe so much rent, did you, [124]

A. No, I sent one letter back on the Trust Company.

(Testimony of Seid Pak Sing.)

Q. Your attorney wrote that, didn't he? Mr. Carr wrote that letter, didn't he?

A. Oh, no, no.

Q. Oh, you sent a letter yourself?

A. Yes, I sent letter for myself first, I think about August at that I answer a letter.

Q. You answered the letter? A. Yes.

Q. Aren't you mistaken about that, and wasn't that letter written by your attorney, Mr. Carr?

A. No.

Q. You are sure about that, are you?

A. Once I say the rent I want to dig the potato and sale for the potato, and then I pay the rent. That is what I answer for the company.

Q. That is when you got the letter about the August rent, when you answered it, you asked for time so you could get your potatoes out?

A. No, I say, I get the letter from the Trust Company that time asking me to pay the first payment of rent, and after I answer the company, I say, "Well, just now my money not ready, my money, till I pick up the potato, then I pay."

Q. I see. But you didn't tell the Trust Company in that letter that you didn't owe $720 rent because you hadn't got 400 acres, did you?

A. No, I didn't write them, I didn't say nothing like that.

Q. You never wrote any letter of that kind to anybody, did you? A. No.

Q. And did you, when you were up here in October, tell Mr. Magruder that you didn't owe this rent, or

(Testimony of Seid Pak Sing.)

all of it, because you didn't get the land?

A. No, I didn't tell that.

Q. Well, what was it you told Mr. Magruder?

A. I just, I say I told Mr. Magruder not quite 200 acre land; that is all.

Q. You didn't tell Mr. Magruder then that you should pay rent on only [125] 200 acres, did you? You and he didn't talk that over, did you, at all?

A. Yes, I did. I think maybe I talked that, maybe I talked to him.

Q. You think now maybe you told Mr. Magruder that you shouldn't pay so much rent?

A. That time I forget. I don't know. I not remember that.

Q. Well, why, if you hadn't had this land, and didn't owe this rent, when the Trust Company wrote you on the first of August, why didn't you come back and say, "I don't owe so much rent"?

A. No, I don't think so. I didn't say anything that time.

Q. I say, why didn't you do it? That is what I asked you. Can you tell us why you didn't do it?

A. Because you see the company, I no want to talk to the company that thing, you know.

Q. What?

A. I not want to tell the company about that thing.

Q. Didn't want to tell the Trust Company?

A. No.

Q. Well, couldn't you have written Mr. Magruder about it just as well?

A. Well, Mr. Magruder because I couldn't with

(Testimony of Seid Pak Sing.)
him, I talked to him all the time.

Q. Well, you didn't talk to him until after the first of August, did you, about the rent?

A. No, at that time I didn't talk to him.

Q. At the time you got this letter from the Trust Company you hadn't told anybody, or hadn't told Mr. Magruder, I should say, that you claimed you didn't owe so much rent at that time?

A. I didn't say what time. I can't tell remember the day, what time I told him.

Q. Very well. Did you ever have any talk with Mr. Magruder on the subject of your not getting the full 400 acres before the first of August?

A. Talk what, Judge? I no understand.

Q. Well, the time you talked with Mr. Magruder about your not getting [126] the 400 acres was in October?

A. No, I think not.

Q. When was it?

A. I come up October; yes.

Q. Yes, October.

A. Yes, October; that is right.

Q. And that was the first time you talked to him about your not getting the full amount of land, wasn't it? A. Yes.

Q. So that on the first of August, or when you got this letter about the first of August, you hadn't yet talked with Mr. Magruder about that at all, had you?

A. No.

Q. Now, I will ask you, then, why didn't you write Mr. Magruder a letter saying, "Why, I don't owe

(Testimony of Seid Pak Sing.)

this $720 rent, because I didn't get so much land"?

A. At that time I am willing to pay, and I no talk. At that time I no tell the company, but I didn't say I would for Mr. Magruder.

Q. At that time you were willing to pay the $720 rent, eh, on the full 400 acres? Is that so?

A. I didn't say—no, because at that time, you see, he give me the letter asking me to get that $720, but I didn't say I would. I just answered the letter, but I say, "I pay after I take out the potato." That is all. That is all I answered.

Q. Well, why was it you never paid this rent when it fell due on the first of August and September, October, November and December? Didn't you have the money?

A. Oh, yes, I got the money, but I want to take out my potato, sell them, because then I pay.

Q. Oh, you wanted to get the money for the rent out of the potatoes? A. Yes. [127]

I intended to dig my potatoes, and then when I got my money out of them, to pay my rent.

Direct Examination.

Q. Now, Seid Pak Sing, about your refusal of this land when Mr. Magruder and you walked over this property, did you tell him then you accepted all he pointed out? A. No.

Q. Did you tell him you wouldn't accept some that he pointed out? A. No.

Q. Did you tell him that?

A. Yes, I told him I no take him that land.

Q. Isn't that the first time you told him you would

(Testimony of Seid Pak Sing.)

not take that land? A. No, I asked him—

Q. You understand my question. You think of my question and then answer. Is that the first time you told him you no take that land? A. Yes, sir.

Q. Then later on when you talked in October, that was really the second time you told him you would not take the land?

A. Oh, I no understand, before you mean?

Q. Well, Judge Corliss had you say the first time you told Magruder you no take the land was in October. That is what you tell Judge Corliss.

A. At that time.

Q. Now, that is one time. But didn't you, when you walked over this property with Mr. Magruder, when you went over it with him, didn't you then tell him you no take these lots and these lots, and some lots?

A. Yes, at that time I tell Mr. Magruder.

Q. Well, isn't that the first time you told him?

A. Yes, I told him at that time about June, but I don't understand what the meaning, because you know I don't understand much English. [128]

When Mr. Brix and this gentlemen took me into the Lumbermen's Trust Company to write up the advertisement in the "Oregonian," the Trust Company did not demand any rent when I was there; they did not ask for rent. Mr. Brix did not ask for rent. I never farmed in Oregon before. This is the first time I have ever been in a lawsuit. The land that I took the 320 bales of hay off was part of the leased land.

Seid Pak Sing excused.

Testimony of R. B. Magruder, for Plaintiff (Recalled).

R. B. MAGRUDER, recalled for the plaintiff.

Direct Examination.

(Questions by Mr. RANKIN.)

These spots running all around these sloughs on Plaintiff's Exhibit 1 indicate the brush land on the edge of the slough. They are put there to show that there was brush.

In order for the tide-gates to operate, the river has to be lower outside than it is inside. When the water is between 12 and 13 feet on the gauge in Portland or in that vicinity, and there is a low-tide, say a zero tide in the river, then the water at this point will be about three feet, will drain out to about three feet; and above zero at the tide-gate on the Midland District. In other words, when we have zero tide at Astoria and there is a rise in the river, instead of its going down to zero at the tide-gates, there is enough water in the river to hold the water up to that point—about three feet above zero. When the river is as high as 14 feet at Portland, there is about 7/10 of difference—that is, a foot in Portland measures on the gauge down there about 7/10ths of a foot; in other words, a raise on the Portland gauge here of a foot, you can figure that it would raise seven-tenths of a foot down there on the gauge there. It lacks about three-tenths. But of course that is changed, modified by the stage of the tides. When there is a full moon tide, it [129] brings it up a little. The tide-

(Testimony of R. B. Magruder.)

gates open themselves when the water is low enough outside. They are hung on a hinge and automatically open themselves when the water is sufficiently low outside. When the water in the river goes down lower than the water on the outside, the tide-gates drain out naturally. I left Clatskanie, going east November 5th and returning about December 14th.

Cross-examination.

(Questions by Mr. CORLISS.)

The tide-gates are fastened on hinges from above, and slant outward a slight slant. They are almost perpendicular. What determines whether they operate or not is whether the water inside is higher than the water outside. They will work on about one to two-tenths of a foot difference. Then the water will run out. They are wooden gates and weighted just sufficiently to make them close when the water is absolutely neutral—as high on one side as on the other. Then they close against the jam of the gates and then as the tide comes up it forms a pressure on the outside, which holds it tightly against the rim of the gate. In the Midland there were four of these gates, and four openings in a group. Each gate hangs independently—separately from the other. Each is four feet high and five feet wide, making 80 square feet for the four gates. The stage of the water in the river—whether it is high or low—would make a difference in getting operation of the gates. The stage of water in the Columbia River makes a difference in the amount of automatic operation of the tide-gates that you would get in 24 hours. During the

(Testimony of R. B. Magruder.)

season of high water, whether the gates will operate depends upon how high it is. When the water gets to 16 or 17 feet at Portland on the Portland gauge there is practically no tide noticeable down there. The tides come, but they are absorbed. At Portland there is about a foot difference between low and high tide, and down there there would only be a foot or eighteen inches fluctuation, while normally there is from four to eight feet. [130]

When the water is 16 or 17 feet at Portland, the water would have to go over the surface of the ground inside of the district, to get any tidal action. It would probably have to be five or six feet above the zero point.

Q. Well, you gave a figure here when the gates would operate when the water was at three feet above zero on the inside. What is that stage at Portland? How many feet was that?

A. About 12 feet—12 or 13 feet.

As part of the cross-examination, plaintiff offered in evidence the annual meteorological summary of the United States Government for the months of September, October and November, 1917. These records show that at no time during these months up to and including December 17, was the water-gauge at Portland as high as ten feet. On December 18, it was 12.6 feet, on December 19, 17.2 feet, on the 20th, 19.3 feet, 21st, 18.8, 22d, 17.8 feet. This exhibit shows that during the month of September, 1917, the highest stage of water at Portland was 6 feet; during the month of October, it was 4.3 feet; during the month of Novem-

(Testimony of Seid Pak Sing.)

ber it was 4.8 feet, and that during part of November it went down as low as .9 of a foot on November 24; and that the average low water at Portland for the month of September was 3.6 feet above zero; for October 2.5 feet; for November 1.8 feet. On December 1st, it was 5.1 feet, December 2nd, 5.5 feet; then it went down until December 9th, when it was 1.9 feet. On the 10th it was 2 feet, on the 11th 2.1 feet; then it went up until December 17th, when it was 9.9 feet.

Mr. RANKIN.—May I interpose a question to Mr. Magruder at that point? At that point the tide-gates were still operating?

A. Still operating.

On the 18th, when the gauge was 12.6 feet, the tide-gates would not be operating unless the water was extremely high on the inside. [131]

Mr. RANKIN.—When the water gets 12 feet here in Portland, when you start to pump, you start the pumps operating down there in the district?

A. Yes.

After December 18th, the readings of the water at Portland were above 13 feet above zero for all the rest of the month, running as high as 19.7 on December 20th.

(Examination by Mr. CORLISS Resumed.)

In the sump from which the water is pumped into the river, there is a gauge on which zero is indicated, and some feet above zero, and also some feet below zero. When the gauge at Portland is 10 feet, the gates on a zero tide will operate when the water is 1 to 2 feet above zero on the inside of the gauge. How

(Testimony of R. B. Magruder.)

many hours they would operate in 24 hours, would entirely depend on how much water there was on the inside. They would operate until it neutralized. If there was ten feet at Portland, and two feet above zero in the sump, the gates would probably operate for the short time until it would drop a few inches, perhaps half a foot—until the water in the sump would go down to one and one-half feet above zero.

Q. And when the water was at eight feet at Portland, and the water in the sump was two feet above zero, the gates would operate some time?

A. Well, that is not a fixed equation. There are a great many other elements that come in. Now, a storm out at sea will change the tides in there. A zero tide does not always register zero when it goes out.

Q. There is some fluctuation there about it?

A. Yes, and the amount of rain that is in the rivers; and sometimes the water will be of one height up here, and the Cowlitz River will raise it down there. You cannot always go exactly by those gauges.

Q. But broadly speaking, when the water is at ten feet at Portland, say, you expect to get some operation of the tides in 24 hours, don't you? A. Yes.

[132]

Q. As the water stage gets lower, you get more operation? A. Yes.

Q. Under ordinary conditions? A. Yes, sir.

Q. Now, these conditions that you have spoken about as effecting the water there, are they ordinary conditions, or are they exceptional conditions? That

(Testimony of R. B. Magruder.)

is, the heavy rainfall, and rise in the Cowlitz River?

A. Oh, it would be rather exceptional.

I do not remember any such conditions during the month of October. It was a dry month. I cannot speak for November; I was here only the first part of it.

(Examination by the COURT.)

Q. In its native condition, that land down there, at what height would the water have to be at Portland in order to inundate that land, wiping out all those canals and everything, supposing the tide was neutralized so that it had no effect?

A. I will have to describe the land to some extent, because your question is too general. Now, on the slough banks, the river banks, the heavier deposit is thrown up first, and consequently it is a little higher on the banks. In the interior, where it is grass, it is a little lower. And part of the banks requires water, say, 15 feet in Portland before it would go over it; but the majority of the land stands at an elevation of about six feet originally. Now, it is settled to about five feet above zero.

Q. Then how high would the water have to be in Portland to cover that land?

A. High-tide would go over it irrespective—that part of it—irrespective of the water in Portland.

Q. Suppose the tide was neutralized, how high would the water have to be?

A. Well, I could get at that Judge, by a low tide in the river, say, [133] a zero tide. When the water at Astoria—when the water up here would

(Testimony of R. B. Magruder.)

probably be—well, it would only be a guess on my part, because I don't think there is any data that would show exactly what that would be.

Q. What is your idea about it?

A. I should think about ten feet, roughly—seven to ten, something like that.

(Examination by Mr. CORLISS resumed.)

As soon as the level outside equalizes the level inside or a little before that the gates close so that the water outside does not come in through the gates if they are operating properly. Whenever the gates operate by discharging water, that is a clear gain; none of that water comes back from the river.

Q. When the gates are operating, what would you say was their ability to discharge this water as compared with what the pump would discharge?

A. Well, that depends a little upon the head of water, and the rapidity with which the tides fall; but it was calculated when they were installed that one hour's operation of the tide-gates was equivalent to 24 hours pumping.

Q. So that the pumps are really only a kind of supplement in clearing out the district? The main action was to be obtained through the operation of the tide-gates?

A. The object of the pump was to discharge the water at periods when the tide-gates would not discharge it sufficiently low or as low as was desired by the occupants of the land.

COURT.—Well, the quantity of water discharged by the tide-gates at a given time would be controlled

(Testimony of R. B. Magruder.)

by the height of the water in the river, wouldn't it?

A. Well, when the river goes down.

COURT.—Suppose the river is down so that there is only a few inches difference between the outside and the inside, then of [134] course the tide-gates would discharge less water than they would if the river was away down and it had full sweep?

A. You would have more head. The volume of water is measured by the head, by the difference.

JUROR.—How high would the water be in the sump before these potatoes would be under water? That is, what is the fall from this potato patch to the sump?

A. Before potatoes were submerged, do you mean?

JUROR.—Yes.

A. Well, there is another question involved there; but the water in the main ditch, before it would get over the surface of the ground, would have to stand about five feet, between four and a half and five feet, on the gauge at the sump.

Q. That is above zero, you mean?

A. Yes, above zero.

Redirect Examination.

The bottoms of the lateral ditches are about 1 to 2 feet above zero. The water sometimes gets down to zero; it is down there now. I don't remember whether it was there two weeks ago, but it was very close to it. From the bottom of the ditches that drain the potato patch to zero at the sump is 2 feet, and the ditches where they are dug through the potato

(Testimony of R. B. Magruder.)

patch are about three feet deep below the surface. It may vary according to whether the ditch has been kept clean or not, and the surface of the ground is not absolutely level. We start the pumps at the Midland District ordinarily when the river gauge at Portland reads between 12 and 13 feet under general conditions.

JUROR.—Does it ever rain so hard without raising the river so the flood-gates won't take care of the water without flooding the land? That is, does the rain ever get so hard that the flood-gates won't take care of the water without flooding the land?

A. Well, the land is very level, and a very heavy rain takes considerable [135] time to get into the ditches through the run-off and get to the tide-gates. That condition might occur.

Excused.

Mr. RANKIN.—With that the plaintiff rests his case in chief, your Honor. [136]

Testimony of W. H. Clark, for Defendant.

W. H. CLARK, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. SEWALL.)

I live at Clatskanie, Oregon, and have for about seven months. I lived on the drainage district about six years before I moved to Clatskanie. My place was the upper part of the Midland District. The number of the tract I occupied was 28. I also had a short piece of a block in the interior, No. 58, a tract

(Testimony of W. H. Clark.)

adjoining mine. I moved down on to this district about six years ago. During all the six years I have been farming, I did principally dairy farming and growing vegetables and other crops. I didn't have a very extensive experience in potatoes. I raised potatoes sufficiently to know the general farming conditions of raising potatoes in that district. I raised them every year as a crop, but not very a very big quantity.

I have acted as trustee of the Midland District. I served about four years. Was elected trustee when the district was first organized and have served ever since. My duties as trustee are to care for the district and look after its drainage, roads, etc. The custom in the district as to pumping after the crops were in was to guard as to the water not raising too high to injure the crop after being planted. I consider it proper to continue to operate the pumping plant until the principal crop is taken off. That includes potatoes. We have never operated the pumps in the fall of the year very much. I don't think we ever operated them as late as November.

I know the methods of raising potatoes in Oregon in the Willamette Valley. I do not consider it good husbandry to leave potatoes in the ground after the rainy season begins. We have found that potatoes should be dug in order to show husbandry in September, or as soon as mature. Plant them as early as you can plant them, and as quick as they are mature take them out to save them and get best [137] results.

Q. When would the potatoes mature that the evi-

(Testimony of W. H. Clark.)

dence showed were not planted until July 15, 1917? That is, the last of them were planted then?

A. That is very late, but we have found that they should be matured by about the same date in November.

If they were planted between the 1st and 15th of July, I should judge they should be dug between the 1st and 15th of November. They should be dug just as quick as they mature, because the weather is such that we cannot afford to leave them. We have found, after the cold weather comes, after the summer season is gone, that every week of rainy weather affects the potatoes and will destroy them without an overflow of water on the surface. In November, after it is cold, we have found it destroys a great many of them in two weeks, starts them to rot and decay without a flooding of water, or the surface water on the ground; the rain—the rainfall. I knew the Chinaman Wak down there. I spoke to him several times about digging the potatoes.

A. I advised him in this, to take up their potatoes just as quick as they matured, and not delay any, because it was liable at some seasons to have it rain so they could not get them off, and they would be destroyed—wasted. I have urged them to that, because I have seen the results of it from year to year more or less with neglect; and sometimes on myself, too.

Q. What did he say?

A. Well, generally, they was in pretty good spirits

(Testimony of W. H. Clark.)

as to having lots of help and plenty of time; couldn't hardly see the danger.

Mr. RANKIN.—I move to strike out the answer as not responsive to the question.

Q. (Question read.)

A. As a rule, they would speak as having plenty of time. [138]

Mr. RANKIN.—He is not stating what Wak said.

A. I cannot give it to you in words, you know, just a few words, but having plenty of time and plenty of help, they was going to be safe.

COURT.—That is what Mr. Wak said?

A. Yes, that would be what they would say.

This conversation was in the first part of November, 1917. I hardly think he heeded my advice, because he did not seem to hurry up, and I was afraid they were going to have a loss. Their method of digging potatoes—generally with a hook, and just hook them out, and pick them out; what we would call a very slow method of handling them.

I could not give the amount of rainfall that fell in the month of December, 1917, but I know it was the most severe rain that we have had since I have been there in that month. I know the effect of the operation of the pump in reducing the water in the district from my experience there and living there. I watched it somewhat close for own interests and the interests of the people. The operation of the pump would not have drained the lands so that those potatoes could have been saved in that month and that year. It was so excessive that we could not if we

(Testimony of W. H. Clark.)

wished to kept it from the surface.

Q. Can you explain to the jury the reasons why you make the statement?

A. Well, for this particularly: Now, to have protected those potatoes and have kept them from rotting, as you had evidence some time ago, the banks of the sloughs as a rule are higher than a distance away on the prairie. Very often if we should have that water down two feet in the slough, still it would be laid over there too far from the ditches for to draw it to take it away from the potatoes or crop. Therefore it would remain, if it is not released from there, it would remain until it rotted the crop and destroyed it, while the water in those sloughs might have been plenty low so as to have taken it away.

COURT.—That is to say, the lateral drains would not have carried the water off fast enough to have kept the water out of the [139] ground?

A. Yes; not sufficient drains, not close enough together, and the potatoes put in rows, of course the water would remain long enough on the crop to destroy it, even the rain alone without the overflow.

The distance between the small drains that conduct the water into the main drain is between 600 and 700 feet. The map shows the distance. These small drains are located on each of the boundary lines of Tract 48, and it is very much the same on Tract 49, and all through. The rows of potatoes ran lengthways to the advantage of planting and keeping them clean, the same as the small ditches or drains, and they were cultivated the same way, because it was

(Testimony of W. H. Clark.)

easier and quicker to do the work. The effect of this cultivation was to leave the ground ridged through lengthways from end to end. Between the ridges there would be just a channel—an open furrow.

Q. Then where would the water stand?

A. Well, all along those straight lines, you see, because they are too far away from the side drains.

The water would not drain along those furrows into the canal because there were not openings made at the ends for the water to go out. The ends were generally a little higher than the land was back in the center. The water, to get out, would have to seep through underneath and go underneath to those ditches. It would have to be carried away or evaporated.

Their process of digging the potatoes was very slow according to our method of doing work, much slower than what we thought was right.

Cross-examination.

When I say our method of digging potatoes, I mean my method, and the general method of the different farmers of the district.

Q. You spoke of the seepage being through the ground there. Is that true of all the tracts, that they are always hollow and sunken in [140] middle and always high on the outside or rim, even all those plots that lie between the fence and the main drainage canal?

A. They differ a little, because the soil is hard and

(Testimony of W. H. Clark.)

solid, more clay in some portions of it, you know, than there is in others.

Q. How about the property through here, from Lot 52 down through Lot 48, lying between the fence down there that runs through that district and the main drainage canal? Is that all sunken in the middle?

A. Not so much. There is brush along there, you know, just harder land.

Q. Coming more particularly to Lots 48 and 49, are those lots sunken in the middle?

A. Yes, I think they are; yes.

Q. What is the use of having a drainage canal along the lower part of those, if it does not do any good towards draining off the surface water off the land?

A. It certainly does good; but you see except you connect the other drains with it from the lower portion, why, it could not drain that way.

There were ditches dug along each side of these lands, and the Chinese also dug ditches through the center of part of these lands. These ditches that are dug along the sides and through the center drain off into the main ditch that takes off a portion of the surface water.

Q. And there is surface water will sink into the ground? A. Yes, when it is too far.

Q. What is the nature of that ground, Mr. Clark? Is it porous, so water will go through readily, or is it clay and hard, so water won't sink?

A. It differs somewhat. You have clay—we have

(Testimony of W. H. Clark.)

some of the land with a considerable percentage of clay in it, while other parts there is not very much.

Q. Maybe I could save you by going through these lots from Lot 53 to and including Lot 48, that ground is of all the same character through that section, is it not? [141] A. Very much.

Q. Is that ground, ground that will allow water to go through rapidly, or is it of clay substance that will prohibit going through rapidly?

A. Most of that will allow the water to drain off and soak through fairly good—quick.

Q. Really quite rapidly, isn't it? It is sort of decayed vegetation, that has a lot of what you might term voids or pores that allow the water to go through quickly? A. Yes, it is open.

Q. What is it made out of? That soil is principally decayed vegetation and woody substance, isn't it?

A. Well, no, I couldn't say that. It is somewhat different.

Q. How rapidly would it go out? Would it lay there like clay for some time, or would it go through quickly? I want you to explain what you mean by the term rapidly. A. The water?

Q. Yes, going through the soil.

A. Yes, it would go through much more rapidly than through clay.

It was a very heavy rain in December, 1917. The rain in November did not affect so very much, it was considerably lighter. We had a very nice, good month. It was not heavy rain. The water did not

(Testimony of W. H. Clark.)

bother us very much. I know the rainfall was very light. The rainfall in December was very high—very much rain.

Q. These two months, Mr. Clark, would bring the rainfall up to some 22.18 inches for November and December. A. That is a lot of water.

I have never known that much water to fall in November and December since I have been there, and particularly in December. It was the heaviest month's rainfall we have had since I have been there, and I have been there about six years. I think 1911 was the first year I went there. [142] The rainfall of November, 1915, was heavier than in November, 1917. The rainfall of November, 1915, was heavier than what we usually have in November. We have had heavier rains in other years. I remember that we had other seasons when the rainfall was very severe, but while we were so very little affected by it, we did not keep very close data of it. Possibly the rainfall of 1917 was not as large as it had been for other years, but for December we won't forget it very much because it was the most severe rainfall we seemed to ever have. We had heavy rains the first part of that month, but I think toward the middle of the month it seemed to be most severe. The rainfall for the year was not above normal. Potatoes in Oregon are rained on and still keep, but after laying to be rained on, or laid in the wet ground, it damages them very much as to quality and then it soon rots them. There are a good many crops in Oregon that are rained on and still harvested, but

(Testimony of W. H. Clark.)

our experience has been that if we leave potatoes in after the rainy season comes, they naturally waste and decay fast every week.

I have farmed a little outside of Clatskanie, not very much. It was up the valley near Silverton. I just took off two crops of potatoes and grain. People differ as to how long it takes a potato to mature, and then the kind of potato, too, makes a difference. I think it takes Burbanks and American Wonders about four months, as near as I can, as I would judge anyway from planting; but it depends somewhat on the season. If it is a warm dry season, or very dry, they don't mature so quick.

Q. What effect does that season have on them?

A. It hurries them up in growing, possibly, in the beginning of the planting, and then it may check them back with change of season, which might not allow them to grow quick enough. It holds them back sometimes a week or more.

I could not give you quite the dates we pumped down there, but we have pumped in the springtime. That is the principal time and we depended upon that opportunity while pumping in the spring [143] for planting, keeping the water down till the crop was in. After that we had no necessity of pumping. I do not think that we have pumped over July 1st. July would be about the furthest when the river is pretty high, you know, and full of water. I don't recall of ever having pumped after July.

Q. You spoke a while ago of when the principal crops were off. What crops were those?

(Testimony of W. H. Clark.)

A. Well, that was the majority of crops I was meaning, you know from the farmers that were taken. Now, some might not harvest their crops so soon. My custom was, as a trustee to go to see if the crops were off, and ask the farmers or the other people if they wished pumping; and it was never insisted upon pumping then. They would get their crop off as a rule, and out of danger, and they don't need it; that is in the fall or late.

Q. Mr. Clark, I guess you didn't get my question. I am asking what the principal crops were that were off when you stopped your pumping. You said the principal crops were off when you ceased operation of the pumps. What were the principal crops?

A. Well, that would mean, possibly, everything but rutabaga or something that would stay in the ground the longest.

Q. It didn't mean potatoes or cabbages or any of those things?

A. Well, yes, it meant those; but rutabagas or turnips would stay in the ground, you know, and not be injured as much as other crops.

We did not harvest potatoes there in July as a rule. We didn't grow many early kinds of potatoes. We did not harvest cabbage in July. Principal crops did not include cabbages and potatoes. No one else ever planted 114 acres of potatoes in our district down there, the Midland District. I went over the lands possibly every month, and sometimes when the river was high, may be every week—that was in the

(Testimony of W. H. Clark.)

spring. In the fall I would go over there not more than every two or three weeks.

Redirect Examination.

The property owners at some of their meetings had taken [144] up the matter of pumping in the fall or winter, and it was decided by the majority of our property owners to not pump after a certain date; that it was not necessary. I just forget our date now. I suppose our minutes would show it.

Q. Did that include the fall or winter months?

A. Yes.

Q. Well, when, I mean, with reference to your fall or winter months, would you stop pumping?

A. That would be in July, in case the water was very high in the river, you know. We would not pump after July. We usually had our highest water in July.

COURT.—Well, you had your highest water usually in July? A. Usually in July.

COURT.—And you had to pump then to protect the land?

A. Not always, or no particular time. Just as long as the river would stay up to a certain stage, there would be danger.

COURT.—The water didn't get that high usually in the winter time? A. No, oh, no.

I cannot remember whether I spoke to Seid Chung, the bookkeeper, about the proper time to dig his potatoes. I remember Wak better than any of them.

(Testimony of W. H. Clark.)

Recross-examination.

The Chinese were not present at the time that we came to this decision when we should pump. I think that was before they came there, or the same year; just about that time.

Excused.

Testimony of Thomas James Bellinger, for Defendant.

THOMAS JAMES BELLINGER, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination. [145]

(Questions by Mr. SEWALL.)

I live in the Midland Drainage District, Clatskanie, Oregon. I have lived there since 1917. I lived in the Magruder Drainage District from 1913 to 1917. I raised potatoes in the Magruder District and I have raised a few potatoes in the Midland District. I am acquainted with Wak, the foreman of plaintiff. He had potatoes right adjoining my tract at the end in 1917. I am familiar with the proper method of husbanding and cultivating potatoes in Oregon, and particularly in the Willamette Valley. The proper time for planting potatoes would be somewhere along the l*and* of May—not later than that; I should think, down there. They should be dug before the rains, or any danger of frost coming and getting them, the heavy rains, because you cannot get on the ground after the heavy rains start.

(Testimony of Thomas James Bellinger.)

Q. What is the effect of the heavy rain upon the potatoes that are left in the ground?

A. Well, the ground is level like pretty near, only it sags a little in the center between the canals and ditches. When they hill the potatoes, they put them in rows, then they bank them up, keep the sun from burning them, giving them a chance to have a nice color. As quick as it starts to rain, the water gets in between those rows, it stands there, the potatoes will begin to get different colors, the eyes will turn red. They will get unsalable.

What destroys the potatoes seems to be the water and the vegetable that is in the ground. I am familior with Tracts 48 and 49 in the Midland District. They are situated, I believe, pretty near the end. All the soil is pretty near the same. Some there is a little more peat than others, and some is a little more clay. It differs a little.

I know about the potatoes that were planted in that tract in 1917 by the plaintiff and his men. I was looking for cattle, going across the district. I saw them there several times planting potatoes. I did not talk with them while they were planting. In the [146] fall I was over to see them several times when they were digging, to see how they were getting along and what success they were making. I said one time to Wak, "It is getting awful late. You ought to get them out." They said, "Oh, lots of time; we will get lots of men bye-and-bye."

This must have been about the 1st of November, along about that time, something like that. It must

(Testimony of Thomas James Bellinger.)

have been in December some time when the rains began. We had an awfully nice fall, I know that. I don't remember the day the rains began, because I never paid a great deal of attention to it. When it did start to rain, we had awfully severe rain.

Q. What was the effect of those rains upon those potatoes that the Chinamen had left in the ground, if you know?

A. Well, I had potatoes, a very few, myself, and then I had cattle out in the field, and I had to go after them when it started to rain, and I dug in the potatoes, and when I dug, they was all turned full of red spots.

Mr. RANKIN.—That is the Chinese potatoes.

A. Yes, they were all full of red spots; about after a week or eight days of rain the potatoes had turned a kind of reddish color.

I should not think it was good husbandry to leave potatoes in the ground as late as December in that district. I always lost mine when I did. When I lost them I just kept mum about it; it was my own fault.

A man ought to easily dig and sew twenty sacks of fair potatoes a day. I saw the Chinaman digging these potatoes before the rains began.

I was over there when they first started to dig, to see how they were digging, and they had three baskets sitting there along the row, that man, and they would hook them up and sort the three kind out and move on. They didn't seem to go at it in a very prosperous way, like white men seemed to dig. They

(Testimony of Thomas James Bellinger.)

were very slow about digging. [147]

Q. Do you know the effect that the operation of the pump would have upon the rain water in the ground?

Mr. RANKIN.—Do you know?

A. Yes, sir, I personally know. I have been there a good many years and seen it. It seems like it takes the water too long to seep through the ground. After heavy rain starts, water seeps out a little too slowly away, stands too long on the flat grounds before it gets away, and the stuff rots.

The operation of the pumps would not do any good in preserving the potatoes if the facts showed that it rained every day of the month from one-tenth of an inch to two inches, practically two inches. The rows would stand full of water a week or ten days after it would quit raining before the water would seep out, unless it was ditched at the ends so that the water could run off the surface right quick. I should judge that it takes close to four months to mature potatoes in that district.

Q. If it appeared in the evidence that potatoes were planted by these Chinamen in these Tracts 48 and 49, and that the last potatoes were planted on July 15, when should they have been dug?

A. Well, I don't believe that they would mature, that they would get ripe, that the skin would set before heavy frost would come and kill the tops, or blight would come and kill the tops.

I pretty near know when we had our frost that year. My potatoes froze down so I dug them. I

(Testimony of Thomas James Bellinger.)

had in a couple of acres, and it was the last part of October and along the first part of November, something like that. It might have been a day or two before November 1st, in October, or a day or two in November. That frost killed my potatoes. After that kind of frost, it would be proper to dig the potatoes within about ten days or two weeks. They would not grow any after that that you could notice. They might grow very little. [148] If you could come and measure them, you might find a little growth, but I never could notice any growth. I found the system was to dig potatoes as soon as the skin sets, so it didn't slip. That was the method to get them out of the ground as soon as possible. The skin will set after the frost in about ten days to two weeks—it might be a few days sooner, or a few days later.

Cross-examination.

(Questions by Mr. RANKIN.)

As a matter of fact, Mr. Bellinger, you didn't have frost in the fall of 1917 until away late in December that would kill potatoes at Clatskanie, Oregon?

A. I think we did. Mine got ripe, and I laid it to the frost that done it.

I think there is a difference between temperatures at Clatskanie and Doraville. I think we got colder climate down there than at Doraville. We don't get warmer when we get to the water. It happens the fog will lay over the land, you get these cold nights, it will get the frost if it happens to freeze, potatoes will freeze down on the ground. I got potatoes one

(Testimony of Thomas James Bellinger.)

place eight acres of them froze. I got potatoes in another place and they are not touched at all. Our falls vary down there. One day may be cold and another warm. In December, 1917, we had very cold weather and lots of rain. The rains were cold—very cold. I don't know how cold it got in December. I never paid very much attention to the thermometer. I just kind of look at the thing, see it is kind of cold, severe weather. I don't remember that, as a matter of fact, December, 1917, was one of the warmest Decembers we had in 18 years. It was cold rains and stormy. I don't recall that December was a very warm month as to temperature. I don't know of potatoes ever being in the ground in Clatskanie in January that were very good potatoes. It might have been, but it was not in the district where I was. I never knew of potatoes being in the Midland District in the ground in January that [149] were good potatoes and harvested.

Q. Might they have been there and you not know about it?

A. I believe there was some potatoes in the Midland District, but I heard others say, but I was not there to see them, in 1914–15. I don't remember. I wasn't living in the district. I was over in the Magruder District at that time. I heard a fellow talk about it, but I don't know how they come out. I wasn't there to see.

It didn't seem that the Chinamen had help enough and digging fast enough. They used the hooks. We found it better to use riggers and horse-power, or

(Testimony of Thomas James Bellinger.)

gasoline power; get them out quicker. I used machinery to plant and to dig. You can get them out so much cheaper than by hand.

Q. And how do they compare with cleanliness, getting out of your potatoes by machine or by hand picking?

A. There were such very few left that it would not pay the difference. Once in a while, of course, there are left some. Digging by hand there are some left, and there is some left by the machine.

I never farmed 114 acres of potatoes down there. I asked Wak one time how soon he was going to get his potatoes out. I kind of thought they were strangers down there, and I wanted to advise them a little. I would like to see them succeed—to make a good thing. It takes potatoes about four months to mature. I never farmed in the Willamette Valley and know nothing about farming there.

Mr. RANKIN.—I move to strike out the witness' testimony in regard to good husbandry in Oregon and the Willamette Valley, because he admits that he has never farmed in the Willamette Valley, and knows nothing about it.

A. I never farmed in the Willamette Valley, no, sir, and I never admitted I was in the Willamette Valley.

Q. You were asked what the custom was, weren't you?

A. If you asked me the question, I didn't understand you, because I can prove I was not raised and born in the Willamette Valley. [150]

(Testimony of Thomas James Bellinger.)

Q. Does all your testimony refer to Clatskanie?

A. No, sir.

Q. Where were you raised?

A. I was raised in Kalama, Washington. I have been in Oregon since 1913, when I moved down on the diked land.

Mr. RANKIN.—I renew my motion, your Honor.

COURT.—I think the farming over there is about the same as in the Willamette Valley, and I think the inquiry is sufficiently general to let his testimony go in. I will overrule the motion.

Mr. RANKIN.—Exception, please.

Excused.

Testimony of Frank Pierce, for Defendant.

FRANK PIERCE, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. SEWALL.)

I live on Tract 36, Midland District—have lived there for three years. I am acquainted with Tracts 34 and 35, 48 and 49. My business down there is dairying. I raise grain and hay, and also potatoes just for my own use. I am slightly familiar with the cultivating of potatoes in the western part of Oregon. My acquaintance with potatoes in western Oregon is confined to this immediate community which we are talking about. According to good husbandry, potatoes should be put in just as early in the spring as you can get the ground worked. July 15th

(Testimony of Frank Pierce.)

is pretty late. I would hardly consider it good husbandry to put them in that late. In our community the proper time to dig them is just as quick as they are ripe enough. The time that potatoes will mature depends a good deal on the variety that you plant. Burbanks should have about 120 days in which to mature. The danger of leaving them in the ground after they mature is in not being able to get them out on account of wet weather. December, 1917, was quite wet. I would not consider it good husbandry to leave potatoes in the ground during the month of December, 1917, [151] because of wet weather. The effect of wet weather upon potatoes is to rot them. I rented some land from Wak on Tracts 35 and 34. I rented them for pasture for one year, and paid $70.00 rent. I took a receipt for it, but have not got it. Mr. A. H. Brix has that receipt, and he is about fifty miles east of Tacoma. During 1917 I had a deal with Wak under which I cut a piece of hay ground. I cut the hay on shares— it was on Lot 46. It was mostly Italian rye grass and a little Alsike clover. They were sowed there; I don't know who sowed them, but the defendant, I suppose. Wak carried on these negotiations with me. There was another fellow in with me, Claude Holmes. We understood that they had they had the hay and wanted somebody to cut it, and we went to Wak and got it on shares half and half. The total crop was 65 tons baled.

(Testimony of Frank Pierce.)

Cross-examination.

(Questions by Mr. RANKIN.)

The Chinese hauled their share of the hay away. I don't know what they done with it. For all I know, it may have been hauled away and fed to their horses. I rented some property in 34 and 35—I think in March, 1917. I can't give you any idea whether it was in the early part or late part of March. It could have been the first part of March. I would not say whether it was or was not. I gave the receipt to Mr. Brix. He owns the farm that I am on, and the land that I rented from the Chinaman he paid the rent on it. He sent me a check to pay the rent, and I sent him the receipt to show him that I had paid it. He paid the rent and Wak gave me a receipt. The receipt was signed in English. I don't think it was signed by the name of the plaintiff, but just Wak. The Mr. Brix I sent the receipt to was in the defendant company. I never had any dealings with any other Chinaman about Lots 35 and 34.

Q. You never had any dealings with this bookkeeper Chung? Chung, stand up, please. Never had any dealing with him about it?

A. I wouldn't say positively, but I think I did.

Q. What was that dealing?

A. I think he signed to the receipt.

Q. What receipt? [152]

A. I think he put Wak's name on the receipt.

Q. He put Wak's name on the receipt? Wak,

(Testimony of Frank Pierce.)

stand up. Which one of these Chinamen did you deal with?

A. I made by bargain with Wak over there.

Q. And wrote the receipt to him?

A. No, sir, they wrote the receipt to me?

Q. Well, which one wrote the receipt?

A. Well, now, I will tell you about that. I wrote the receipt myself and took it down there, and one of them men signed it, and I wouldn't say positive which one.

I am positive Wak is the one I had the dealings with, but cannot say whether he is the one that signed the receipt or not.

The time you get on the ground in the Midland District so that you can plant depends on the spring rains, getting the water out with pumping and draining out through the tide-gates.

Q. And if you cannot get it in any earlier than July, why it is better to get it in July than not at all, isn't it?

A. Well, it depends on what you put in, whether it is or not.

Q. Potatoes? A. No.

If you cannot farm it in July, do not farm it at all for potatoes. I never heard of potatoes being in the ground in the Midland District in January. What I have testified about farming and agriculturae is just what I have personally understood from my experience and my observation. I am a cattle raiser.

Excused.

Testimony of Francis E. Burke, for Defendant.

FRANCIS E. BURKE, called as a witness on behalf of the defendant, being first sworn, testified as follows:

Direct Examination.

(Questions by Mr. SEWALL.)

I live on the Midland District, on Tract 27, and own Tracts 27, 28 and 55. Have lived in this district for four years the first of March. I am acquainted with the district and the lands in the district. The business I follow is dairying principally. I raise a few potatoes and grain. I am familiar with farming conditions down there. [153]

Q. Are you acquainted with the farming conditions and the raising of potatoes in western Oregon?

A. Well, not only in that district.

Q. Are you acquainted with what is known as the proper way, or the good husbandry in cultivating potatoes in this district?

Mr. RANKIN.—We will have the same objection run to all this testimony, your Honor, that we have previously made.

COURT.—Very well. I think I will allow this to go in.

Mr. RANKIN.—Very well. We will have an exception, it is understood.

COURT.—Yes, let it be understood.

Q. (Question read.) A. Pretty much so; yes.

The proper time to plant potatoes is the latter part of May—not later than the 10th or 15th of June down along there. The proper time to dig them is

(Testimony of Francis E. Burke.)

as soon as they are ready. It takes potatoes down there about four months to mature—close to it. The danger of late harvest is that if you leave them too late, you get the fall rains and they will rot.

"Q. How long will it take potatoes to rot in the ground after the rains begin, the heavy rains begin in the fall? A. I wouldn't want to gamble on it, on the water staying on them over the week, or it would spoil them, or even that long." December, 1917, was very wet. It was not good husbandry to have potatoes in the ground during the month of December, 1917. I knew that potatoes were in Tracts 48 and 49 during the year 1917. I told Wak to get his potatoes off before the fall rains began or he would not get them. This was some time in September or October, I don't remember the date. We were talking about potatoes, and I didn't suppose that he knew the conditions up here as well as he did in California. I told him for his own benefit he better get those potatoes out, and I told him the reasons why. He said, "Oh, we will get the potatoes out. Get plenty of men; go down to California get lots of men."

Cross-examination.

(Questions by Mr. RANKIN.)

If I did not get my land before May or June and did not get it planted before July, I would not expect to harvest very much. I would begin harvesting as [154] soon as they were ready.

Q. Well, when would that be if you started in planting in May, planted in June and up to the middle of July?

(Testimony of Francis E. Burke.)

A. You wouldn't harvest unless frost had killed the vines or else they were moulded.

Q. You would wait until the frost killed the vines, or they moulded? A. You would have to.

Q. When would you begin harvesting?

A. Just as soon as they were ready.

Q. I mean as to time. What time in the year?

A. If the frost killed them in October, I would go to digging them in about ten days.

Q. How late would you harvest, planting in May and as late as July, how late could you dig?

A. It would depend on how many I had, I suppose.

Q. Well, 114 acres, I said.

A. I would try to get them all out by the first of November if possible; by the 15th if I expected to harvest them.

Q. Harvest 114 acres in 15 days? A. 15 days?

Q. Yes, you said the middle of October, and you would get them out by the first of November.

A. I would not expect to harvest that many.

I never raised more than 3 acres of potatoes; never raised 114 acre tract. My principal business is dairying.

Testimony of Joseph Hackenburg, for Defendant.

JOSEPH HACKENBURG, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. SEWALL.)

I live in a straight line between 10 and 11 miles

(Testimony of Joseph Hackenburg.)

from Clatskanie. My business is general farming. I am and was in the employ of the United States Government, keeping the weather reports at Doraville, Oregon. This station is [155] about 10 miles from the land in question, and at an elevation of about 600 feet. I have the original data of my observation showing the rainfall at that station for the months of October, November and December, 1917. The original data which I now produce show that the rainfall at that station for the month of October, 1917, was as follows:

October	1	.04	October	19	a trace
	2	a trace		21	a trace
	10	a trace		24	.42
	12	.06		26	a trace
	16	.01		25	.18
				27	.13

and that on all the other days of said month there was no rainfall at all.

The original data of the rainfall at that station which I now produce for the month of November, 1917, shows such rainfall to be as follows:

November	2	.12	November	22	.02
	3	.26		23	.03
	4	.02		24	.03
	5	.45		27	.10
	10	.07			
	11	.11		28	.34
	12	.53		29	.81
	13	.03		30	.24
	17	trace			

(Testimony of Joseph Hackenburg.)

and on all the other days of said month there was no rainfall whatever.

The original data of the rainfall at that station which I now produce for the month of December, 1917, shows such rainfall to be as follows:

December	1	.73	December	16	.51
	2	.80		17	1.98
	3	.25		18	1.21
	4	.87		19	.87
	5	.14		20	.02
	6	.46		21	.39
	8	.02		22	.65
	9	.20		23	.11
	10	.13		25	.14
	11	.62		26	.93
	12	.55		27	.85
	13	1.82		28	1.19
	14	1.24		29	.65
	15	.34		30	.34
				31	1.09

Only two of the days of said month were without rainfall.

There is a very slight difference, as far as rainfall is concerned, between Doraville and down at Clatskanie, and there is some as far as frost is concerned. I have never taken any temperatures at Clatskanie, but I have lots of times inquired about the temperature and frost conditions in Rainier further up the [156] river from Clatskanie. There is not much difference between those two. The country is about the same—they both lie just at the foot of the hills.

(Testimony of Joseph Hackenburg.)

Whenever a heavy frost comes that goes down to about 30, the frost would undoubtedly be heavier down there because it usually settles, unless there is a fog. The frost depends on conditions. Naturally the frost would be heavier down on the river. The month of October, 1917, was a fine month. The year 1917 was a sort of off year. The wet weather came later and it seems as if the dry weather stayed longer in the fall, because in October we generally expect about three inches, between three and four inches of rain. The average is 3.60 inches. Our November is always the rainiest month in the year right here in Oregon. The average rainfall for that month is be*tween and* nine inches. So that while the spring was very late, and the rain very late, the dry weather kept on in the fall longer. It was one of the driest Octobers and driest Novembers that I ever remember.

Q. Was there any frost during the month of October, 1917?

A. October 28, it went down to 27. But now you must understand that when the frost at the station, that is in the shelter, is 27, on the ground it will be probably from one to two degrees less a few feet right up from the ground it is always less. You hold your thermometer right down on the ground you will find there is a difference of from one to two degrees lower.

The total rainfall for November was 3.18 inches. The printed report shows as follows: Referring to the month of November, 1917: "The month has been

(Testimony of Joseph Hackenburg.)

abnormally warm and dry, mentioning November of 1888 and 1905. While the temperature was five degrees above normal, the rainfall was nearly six inches below the average."

The report shows the climatic conditions during December, 1917, as follows: "This has been the warmest December and the rainiest month on record here. Much apprehension is felt for fruit and vegetables and the coming fruit and grain crops owing to the abnormally warm weather."

I raise potatoes and have for perhaps 30 years, and never raised very many, but know the general farming conditions regarding the planting and harvesting of potatoes in western Oregon? [157]

In western Oregon I would consider the proper time to plant potatoes from the end of March until about the middle of April. The idea is to get them in as early as you can. The proper time for harvesting them is in September and October—not later than October. My idea is to get them in as soon as you can—the sooner you can get them to growing, the less you risk them. You should harvest them when they are ripe; or if they are not ripe, harvest them before November, anyhow, because you are likely to lose them.

Cross-examination.

A low elevation of 600 feet will probably have an effect on temperature, but it depends on the air drainage, you understand. If that particular place has much air drainage, draft of air going, it is not

(Testimony of Joseph Hackenburg.)

likely to freeze. Elevation makes a little difference in temperature. Six hundred feet should make a difference. If you are protected your temperature will not have so big a difference. But if you are not protected, and the northeast wind strikes you, the temperature will probably be lower. Now that all depends upon the topography of the land. Temperature would be reduced where it is near water, but not when it comes to very heavy frost.

Q. Then you feel, do you, that a temperature at 600 feet elevation at Doraville is not as cold as it would be down the river, not at Clatskanie, but out there on these meadow lands, or drainage lands, drainage districts?

A. Well, there would be naturally a slight difference; it would be warmer; but take it when it comes to a frost of 27, there will be very little difference. In such a case, the freeze will be, if anything, harder on the low lands.

That is not only my idea—I know it. I have kept the weather reports down there 17 years. I have no data as to whether or not there was a frost at Clatskanie or on these lands in November, 1917. The frost naturally had killed the vines there, I am sure of that. In 1915, the rainfall in November and December was 22.63 inches. The rainfall of 1.98, the highest in December, 1917 was not a great amount, but it was keeping it up. We have had much larger rainfalls in a single day. We had a whole lot larger rainfalls, 18 or 20 hours, although they were divided

(Testimony of Joseph Hackenburg.)

into two days, you understand. Have had as high as 3.67 inches in December, 1915.

It is here stipulated that the defendant does not claim that the rainfall [158] during the month of December, 1917, was in any sense the act of God; and that defendant cannot be relieved of any liability upon the theory that the damage to the potatoes was the act of God. Nor was the rainfall for the year abnormal.

Redirect Examination.

The rainfall for December, 1917, was the greatest rainfall of any month that we have had any report of.

Testimony of P. J. Brix, for Defendant.

P. J. BRIX, called as a witness on behalf of the defendant, being first duly sworn testified as follows:

I live in Portland, Oregon—have lived here a little over a year. I came up from Astoria. I am engaged in the lumber business. In 1917 I was the president of the defendant. I remember a conversation with plaintiff regarding the lease in question at the office of defendant in Clatskanie, Oregon, some time in the fall of 1917. Plaintiff said that things developed that he was unable to finance himself—that banks in California would not loan the necessary money up in this country, and that he wanted us to help him out. We thought we probably would help him on the financial end of it. I understood from that conversation that he would not put in all the 3,000 acres. He said so, said he could not handle it. I had another conversation with him in the Oregon

(Testimony of P. J. Brix.)

Hotel in Portland. This was the time the lease was cancelled. I do not remember telling Mr. Magruder at that time that he should have pumped. I don't think I told him that, but I might have told him and not remember Mr. Magruder was there. I don't think he made any statement why he had not pumped. I rather think the matter of pumping in the district was discussed, but I don't remember all of that conversation.

It was stipulated by the plaintiff that he was at the time of the commencement of this action and is now indebted to the defendant in the sum of $1,558.40 on account of the second counterclaim set forth in the defendant's answer, and the Exhibit "A" attached to the answer is a correct bill of the items of said account.

Defendant offered in evidence the following exhibit, which was received without objection and marked Defendant's Exhibit "F," and read as follows:

Defendant's Exhibit "F."

"San Francisco, August 9, 1917. [159]

Lumbermen's Trust Company,

Portland, Oregon.

Gentlemen:

Seid Pak Sing has requested me to reply to your favor of the 28th ult. in reference to the rental due under the lease from the Columbia Agricultural Co.

When Seid Pak Sing took this lease he was told that he would be able to harvest his crop in July as

he does in this state, and relied upon the money coming from such crop to meet the payment of rental on the first of this month, but he has ascertained that owing to the difference of farming conditions between your State and California, and owing to certain matters not within his control, he will be unable to harvest his crop until some time in September, and would therefore request that you grant him an extension of time to make this first payment of $720 until after he has harvested his crops.

He has spent a large sum of money in the planting of his crops, and I am sure that you are perfectly secured under the terms of the lease in the payment of his rental, and the extension of time requested would be of great assistance to Mr. Sing.

Trusting to receive a favorbale reply from you, I am,

Very truly yours,
STERLING CARR."

Mr. SEWALL.—I should now like to introduce a deed made by the Columbia Agricultural Company to R. B. Magruder dated December 21, 1912, and recorded in the Records of Deeds for Columbia County on December 31, 1912; certified copy by the County Clerk of Columbia County.

Mr. RANKIN.—We wish to object to this, if your Honor please, on the ground that it is incompetent, irrelevant and immaterial, has no bearing upon the issues in this case, and if offered for the purpose, that they were not obligated to do any pumping, that it is not proof upon the point, the testimony showing that

the trustees were not under any corporation such as forming a drainage district, but were in the shape of a partnership of which the Columbia Agricultural Co. had a majority of interest and the controlling interest on the board of trustees; and so [160] far as the deed is concerned and its obligations, they are not proof in this case as to plaintiff's information or knowledge of whether or not the company would pump, and it is immaterial upon that issue.

Mr. CORLISS.—I would make this suggestion, if the Court please. This cannot in any manner prejudice the case, and it will raise some legal matters that will come up later. Your Honor will tell the jury one way or the other whether this has any significance in the case, and they will be bound by it of course.

COURT.—I think I will let the evidence go in, and it will be controlled by the instruction of the Court in the end.

Mr. RANKIN.—Note an exception.

COURT.—You may admit all those deeds *pro forma*, and let them go in.

Mr. RANKIN.—If the Court please, for the benefit of the record it is understood we have the same objection the same ruling and exception.

COURT.—Yes.

Said exhibit was received in evidence, marked Defendant's Exhibit "G."

Defendant also offered in evidence, subject to the same objection and exception, deed from R. B. Magruder to Columbia Agricultural Co., dated December 23, 1912, recorded December 31, 1912, in Book 18

(Testimony of Norman Merrill.)

page 209. Said deed was received in evidence over said objection as Defendant's Exhibit "H," and an exception allowed plaintiff.

Defendant offered in evidence Defendant's Exhibit "J," being an instrument executed by it to the trustees of the Midland Drainage District. Said instrument was not witnessed or acknowledged and was never recorded. The execution and delivery thereof was duly proved. Thereupon plaintiff objected to the receipt of this exhibit in the ground that the instrument was void because not witnessed and because not acknowledged, and on the further ground that the instrument had never been recorded, and so constituted no notice to the plaintiff of the existence thereof or of any of its provisions, and that there was no evidence that plaintiff had any actual knowledge thereof. Said objection was overruled by the Court, and said instrument received as Defendant's Exhibit "J,' and plaintiff allowed exception. [161]

Testimony of Norman Merrill, for Defendant.

NORMAN MERRILL, called as a witness on behalf of the defendant, being first duly sworn, testifies as follows:

Direct Examination.

I live at Clatskanie, Oregon, and have lived there since 1885. My age is 68 years. I am fairly familiar with the Magruder and Midland Drainage Districts. I have been over them often. I farmed off and on there for the last 25 years, but not on these two districts. I am pretty familiar with the character of the soil in these districts. I have raised potatoes in this

(Testimony of Norman Merrill.)

vicinity for sale and for my own use. For some years I raised quite a lot. I think I had 20 or 25 acres some years, but other years I would not have very many. I remember the year 1917 when these Chinamen were there working this land. I remember when they put the potato crop in that year. They were working at it for some time, beginning, I think, as early as April, and working on pretty well through the fore part of the season. I don't know exactly when they got through. I think they had about 20 men putting in those potatoes—sometimes less. I saw the speed with which these men worked. I consider that the ground was prepared and the crop put in very slow. Planting was done by hand. They furrowed the ground out, and dropped the potatoes by hand and covered them with rakes. They didn't use a potato planter. I remember they were digging these potatoes early in October. They may have dug earlier than that. Sometimes they had as low as 12 men digging. I counted one day 12 men digging. Other days I saw more. At no time did I see to exceed 23 men. I have dug potatoes myself and have seen them dug. I know how many sacks of potatoes a good fair workman can dig in a day. How many he can dig depends upon the crop largely. Any case of a good average crop he can dig 20 sacks by hand. If the crop is poor he can't dig so many. I was over these districts when these Chinamen were digging these potatoes a good many times. I watched them lots of days.

(Testimony of Norman Merrill.)

Q. Did you take any notice about how many sacks a day those men were averaging?

A. It was pretty hard for me to get a sack average, because some days they seem to lay off, some of them, they would work part of the day and lay off; but about eight sacks to the man, was for those that were digging. I didn't include those that were hauling them in.

They sorted them in the field—dug them out and then put them in—most [162] of them in three different grades—No. 1, No. 2 and culls. I didn't get the average quality of those potatoes—I cannot say about that. I am sure over half of them were good potatoes. During October and November I saw these men stop digging on account of the rain. They said that was the reason that they were not digging. I have seen some days they did not dig. Wak told me it was too wet.

Q. During the month of October and November, were there any weather conditions there, such that potatoes could not be dug?

A. I think they could have dug. I should have dug if I were them.

October and November were pretty fine months—fine weather most of the time. My judgment is that the loss of time from these men laying off during October and November would have been equal to about one-fourth of the crew, there didn't more than threefourths of them work steady the whole day.

I know Mr. Wak. He came to my house at Clatskanie a good many times. I have seen him on the

(Testimony of Norman Merrill.)

land itself many times. I have talked with him a good many times about the importance of getting these potatoes dug before the rains came on. Sometimes he said that he wanted to get more men, but could not. Other times he said that he was going to get more men. Sometimes he said he was getting along pretty good as it was—and different statements. I told him that conditions were different here from what they were in California, and he would have to get his potatoes dug or they would get spoiled by rain or frost. I tried to explain it to him as best I could. I seemed to get a *pretty understanding* with Mr. Wak. I have not had a great deal of experience, but have had considerable experience talking with Chinamen. I don't talk the language at all. I seemed to be able to get them to understand.

There was a frost. I could not say that it was very heavy—enough to kill vegetation. I know it killed the corn, it turned white—perfectly white. It was pretty late in October—I don't remember the exact date. It turned the potato vines black. My judgmen is that potatoes should be dug by the first of November or about that time whether there is any frost or not.

Q. Well, suppose there is a frost so bad that the potatoes stop growing, how many days after that will the skin be in shape so it is good husbandry to dig them?

A. Well, that would depend some on land conditions; but I dig them out and leave them lay in the sun for about half a day, and it seems to fix the skin

(Testimony of Norman Merrill.)

in pretty good [163] shape, even if it is a little inclined to slip when you first take them out of the ground.

I remember that December, 1917, was very wet. It just kept pouring pretty much all the month. I know where this potato crop was lost. The Chinamen ran the furrows on this land mostly parallel with the small ditches that divided the tracts. The rows went the long way across the field—ran toward the main drainage ditch. These potatoes were hilled up and there were furrows in between them. When this rain came the effect was that the water filled up between the furrows and stood there.

Q. Was there any way for it to get off except by seeping through and getting out through these small drainage canals?

A. Well, the most of it there was not. I didn't look all over it carefully, but I have seen it when the furrows was full between the rows almost all the way through.

COURT.—Was that because the water had backed up on it and the canals were unable to carry it off?

A. No, sir; not at the time that I was looking at it. There would have been fall enough to have drained it if the furrows had been opened through into the canal.

My experience is that the effect of water standing on potatoes in the ground like that at that season of the year spoils them. How soon it spoils them depends a lot on the variety of potatoes. The white potatoes won't stand very much water. Red ones

(Testimony of Norman Merrill.)

stand a little more. Burbanks are white potatoes. Ten days would be enough to spoil them. I think less than that would rot them in most cases. I have had quite a lot of potatoes spoiled other years. I was there about December 10—about three times in December, I think. I cannot think that the operation of the pumps would have made any difference in drawing this water off.

Cross-examination.

Q. Are you a contract holder in the Columbia Agricultural Co.? Own any [164] land or buy any land from them?

A. I bought a half acre, I think, once from them.

Q. In these districts? A. No.

Q. Lease any land out in these districts?

A. No.

Q. Never had any land from the company in the Midland District at all? A. No, sir.

Q. What are you doing walking out there three or four times a month then?

A. Well, sometimes I was doing one thing and sometimes another.

Q. Well, what were you doing?

A. Walking around.

Q. What were you walking for?

A. I had charge of this hay that Mr. Pierce and Mr. Holmes sold. I was looking after that part of the time. Other times I went down for to see different people living there. Used to go down and see Wak quite frequently.

Q. What was your idea in going down to see Wak?

(Testimony of Norman Merrill.)

A. Oh, have a talk with him.

Q. Didn't have anything else to do?

A. Sometimes I did. Then I didn't go.

Q. What other business did you ever have on that district outside of going there to look after this hay?

A. Oh, I have bought considerable hay there myself?

Q. From whom?

A. I bought from different ones.

Q. Who?

A. Well, I bought from Mr. Galloway.

Q. Anybody else?

A. Yes, I bought from Mr.—a man over on the front there. I can't just get his name. He lives close to Mr. Graves.

Q. Was this in the fall of 1917 that you bought this hay?

A. I bought some in the fall of 1917. I bought Mr. Holmes—some of this same hay that Mr. Pierce and him cut.

Q. Did you buy any hay from Galloway in the fall of 1917? A. No, sir. [165]

Q. Then you didn't go over there to see Mr. Galloway about hay this time, did you? A. No.

Q. Then why did you go over on this district?

A. Well, I don't hardly know why I did. Sometimes it would be one thing and sometimes another.

Q. Did you go over there at all? A. Yes, I did.

Q. You are sure of that?

A. Why, I certainly am.

Q. Did you keep an account of all the men that

(Testimony of Norman Merrill.)

were out there on the potato patches? A. No.

Q. The Magruder and Midland Districts?

A. No.

Q. Did you ever go over to the Chinese bunk house when you saw some of them working out in the field?

A. Yes, sir.

Q. Did you see men there in the bunkhouse?

A. Yes.

Q. Lots of them? A. Oh, no, not generally.

Q. Well, how many?

A. Well, sometimes one number and sometimes another.

Q. Well, how many? What was the most you ever saw there at a time, during the days when you could work out in the field?

A. I think I saw 20, as many as 20.

Q. 20 there when you could work out in the field? You have seen 20 sitting around the bunkhouse there? A. Yes, I think so.

Q. Didn't see any out in the field at all, did you?

A. Not at that time.

Q. And that was a good day to work?

A. I considered it a fair day to work.

Q. You estimated there were 50 acres there of hay?

A. That was my judgment. I didn't measure it. [166]

Q. And it would cut about three tons to the acre?

A. That was my judgment.

Q. That would make 150 tons? A. Yes, sir.

Q. Did you know what that acreage actually cut?

A. No, I don't know.

(Testimony of Norman Merrill.)

Q. If it cut 63 tons, you were about half off, weren't you?

A. Yes, if it cut 63, but I have no reason to believe it did.

Q. I say, if it cut 63, you were half off?

A. Yes, I was half off if it only cut that, if they cut the whole tract.

Q. Do you think your other testimony bears about the same relative ratio to actual facts?

Objected to as argumentative, and objectionable.

Objection overruled.

A. I think there was more than 63 ton of hay there.

Q. How do you remember just how many men were in the field at any particular time you were out there, Mr. Merrill?

A. I was quite interested in seeing how these men succeeded. It was a new thing and I had been watching the development of this land from the very beginning. I sold quite a lot of it to the Columbia Agricultural Co.

Q. If you will just answer my question, I will appreciate it. How did you know how many men were in the field? A. I counted them.

Q. Give us a day or month when you counted them there, and how many were there there?

A. In October.

Q. And what time in October?

A. Pretty well toward the last.

Q. How many men were there there in October?

A. I counted 23 men one day.

Q. Working in the field? A. Yes.

(Testimony of Norman Merrill.)

Q. And that day did you go back to the bunkhouse? [167]

A. I am not certain. I think I did. I was there looking after some cattle, and I was inquiring from them if they had seen any of my cattle, and I was around there a good part of the day, and I paid attention to what they were doing.

Q. Did you find any in the bunkhouse?

A. I did on several occasions, but I ain't positive—

Q. I am speaking of this time in October.

A. I am not positive that I did that day, but I counted 23 in the field.

Q. Will water stand on this land?

A. Not at that time.

Q. Well, will water stand on this land?

A. Beg pardon?

Q. Will water stand on such lots as 48 and 49 there?

Mr. SEWALL.—Does he know these lots?

Mr. RANKIN.—He knows everything about this district. Everything you ask him he knows about.

I counted the sacks of potatoes on one of these occasions that I was there in October when they were digging. The ground was very soft at the further end of the field. The ground was soft and they could haul but very small loads. Near the dike the land was heavy, harder and solider, and they took bigger loads. This was in October, and the ground was soft because it was low—very low land in some places where they were digging.

Q. Well, what effect would lowness have upon it?

A. Whether the water was nearer under it. It is

(Testimony of Norman Merrill.)

pretty soft there most any time. [168]

A. Well, at that meeting he said he was somewhat disappointed in being able to raise funds and that he would not be able to finance himself for the full 3,000 acres, I believe; he said that the banks of California refused to let him have money to raise crops outside of the State, and he would have to make some different arrangements to be financed and wanted to know if we would assist him in some way.

A. He asked us if we would assist him in any way, sign notes for him or lend him the money or something. We asked him about how much money he had. He said he though he might finance 1500 acres. That would be three units.

A. Five hundred acre units. That means Chinamen houses on each 500 acres. That would be three 500-acre units. We told him we thought if he had money enough to put in the three units, and would go ahead and do that, then after that we probably could do something for him in a financial way, if he would give us a mortgage on the property he had already put on the three units.

We did not definitely settle it. We did not sign any agreement of anything. We talked it over. It was left sort of up in the air.

I met plaintiff again in the Oregon Hotel in Portland, Oregon, about Christmas, 1917. There were present Mr. Brix, Mr. Magruder, plaintiff, another Chinaman and myself. Plaintiff stated that he cancelled the lease. We told him it would be all right. There was nothing said at that time about damages

(Testimony of Norman Merrill.)

under the lease. He said the water was over the ground spoiling the potatoes. He didn't say that they were spoiled, but that they would be very shortly, and at that time figured that perhaps they were spoiled. I asked Mr. Magruder if he could pump the water out so as it would do any good, and he said it could not be done. The rain was so excessive that pumping would not do any good. That is all I remember being said about it. I remember it was myself that asked him about the pumping.

The reason why we didn't go ahead and put up more cantonments [169] or camps on these units was we were not quite sure he would come to occupy them. He hadn't been quite certain what he could do. He changed his mind several times, and we only put up one, started to put up one; we were afraid to put up all of them for fear he would not occupy them; and as afterwards developed, I don't think he would have.

Cross-examination.

He did not occupy the one we built. I don't know when it was built; some time in January, I think.

Testimony of R. B. Magruder, for Plaintiff (Recalled).

R. B. MAGRUDER resumes the stand.

Direct Examination (Continued).

I helped organize the Magruder and Midland Drainage Districts, and am familiar with the lands situated in both of them. I know the lands the com-

(Testimony of R. B. Magruder.)

pany owned during March, 1917, at the time the lease was made in these districts. I knew at the time what lands the defendant had leased or sold or contracted to sell to purchasers at the time the Chinamen came up to take possession of the lands. I am not sure that I could recall every tract now. There are a great many small tracts there. I knew the land that the company owned at that time that was free from leases and selling contracts.

I think Wak first came up about the latter part of March, and took possession on the Magruder District. I understood that he was the man in charge for plaintiff.

Q. State, Mr. Magruder, so we will get through with this case some time this week, what was done toward turning the lands over to the Chinamen?

A. Well, on the Magruder District I indicated them both on the map and on the ground. The Magruder District is very clear of brush, and from the camp that was constructed you can see practically all over the district. Wak and another Chinaman and I went over the lower end together, and personally examined the tracts on the north and west side of the drainage ditch. [170]

I could point out those tracts on the plat to the jury.

A. The camp was located on Lot 18. Tracts 15, 16, 17 and 18 could be readily seen from the camp. Those, as I remember it, were pointed out to them, that they could have any or all of the tracts down to the levee, or a little skirting of brush that was along on the levee on the northwest side of Tract 15. Well,

(Testimony of R. B. Magruder.)

then we went out over Tract 20 and crossed the bridge here and went into these three tracts, 9, 10 and 11, and they were shown them on the ground.

Those tracts were shown to Mr. Wak on the ground. A large Chinaman went with us *that*. I forget just what his name was. He is not present.

There was 7 and 8 that time also unoccupied, but I am not sure without looking it up. I am not sure about 7. Yes, I think 7 was there. Levings had these two tracts, 5 and 6, and I think no one at that time had 7.

Q. So then you indicated to him at that time 7, 8, 9, 10, 11, 20?

A. This was brush here over here, and we put stakes up there across from that point where it was to be excluded.

Q. Then 15, 16, 17 and 18.

A. Yes. Then we arranged a right of way across this part of 19, so he could get through there.

A man named White occupied 19. There were about 150 acres of this land clear and suitable for cultivation. All of this had been in grass for several years. Tracts 7, 8, 9, 10 and 11 had been seeded to grass—the cleared portion of it.

A. Tract 20 had been used for pasture for a good many years. Tract 18 had been in cultivation in potatoes and oats. Tract 17, I think, had never been broken. Oh, yes, I will modify that. 17 had been broken, and one crop of potatoes raised on it, and then allowed to grow up to wild grass; nothing fur-

(Testimony of R. B. Magruder.)

ther had been done with it. 16 had not been broken; nor had 15.

A. Well, the Midland District the situation is a little different. The [171] first camp was built or rather house remodeled for them on the Magruder District; and while they were living in that they put some crops in on the Magruder District, and while that was in progress, we built the camps for them on the Midland District.

The camps were located on tract 31.

Q. Who located that camp there, Mr. Magruder, for the Chinamen?

A. Well, Wak and several of us went. I was going to see several of the other Chinamen. Wak and several of the Chinamen went down in my boat one day, and there were two places that seemed suitable for the camp, and it was left to them to select the particular location. One place that was suitable was down on Lot 35 and the other was on 31, and that was the one that was selected. 35 had some advantages and 31 had some, but they selected 31.

Q. Now, will you please state, Mr. Magruder, just what you did set off these lands to these Chinamen in that district?

A. Well, it was done in a very general way. There was more land down in there than the Chinamen required under the lease, that is, more cleared land, and the tracts were pointed out. I went over some of them with them, and several times we walked over different places, and shortly after we went down there we started to break up the land with the cater-

(Testimony of R. B. Magruder.)

pillar for them, commenced up in here, and broke this, and they followed along with their teams and planted the potatoes.

In the Midland District there was fully 350 acres of cleared land suitable for cultivation that was not under contract. Those lands were all free from lease or contracts of sale. The Chinamen had copies of the blueprints—just such a plat as we have here, Plaintiff's Exhibit 2. The lands that I had indicated to them were marked on the map.

A. And I went over it with the bookkeeper and Wak. We had maps spread out in the new bunkhouse. I remember, one particularly, one rainy afternoon. The Chinamen were rather a novelty to me then in the way in which they operated their cookhouse, and I remember this very [172] distinctly that we went over all these details there.

I gave them a copy of the map very shortly after they come—before they started to plow.

Q. Now, Mr. Seid Pak Sing has stated on the witness-stand that he came up here about the end of June, and remained until the 14th of July, at which time they finished their planting, as I recall the testimony, and during that time, he had a conversation with you wherein he wanted some more land. Please state if there was any such conversation ever took place.

A. Yes. About that time there was a discussion regarding it, but if my recollection serves me correctly, that was for 1918 that he wanted this land.

That conversation took place about the time they

(Testimony of R. B. Magruder.)

were finishing up, about the last part of July, 1917.

A. After we finished breaking the land with the caterpillar it was some time along about the Fourth of July, as I recall it. That ended the crops, the land that they expected to crop for the year 1917. We had enough broken up ahead with the caterpillar to keep them busy as long as the planting season would last. Then when they got the potatoes planted, or about through with them, Seid Pak Sing spent nearly all of that month there and helped the boys, and rustled them up, cut potatoes. He had another Chinaman there, a labor contractor who had been furnishing labor for some canneries, and at the time that we went over the land—a very hot day, I remember—this Chinaman and Seid Pak Sing accompanied us; accompanied us part way, at least. We looked over the land, but it was after a conversation or discussion for the next year in 1918.

Plaintiff at that conversation ask me for any more lands under his lease for 1917. It would be the extension of the lease for 1918. At that time he did not say anything about not having received 400 acres. That question never came up. I don't think I ever heard [173] during the year 1917 that he had not received all the 400 acres. Neither the plaintiff nor Wak nor the bookkeeper, during the year 1917 ever said that plaintiff did not owe rent for 400 acres. The first time that I heard that they had not taken or did not expect to pay for 400 acres was in a letter written shortly after the 1st of January. I made demand for the rent thru the trust company. Plain-

(Testimony of R. B. Magruder.)

tiff's Exhibit "A" is a letter written by plaintiff to the defendant directed to me. That is the letter that I referred to. This rent was never paid for the land that they used in 1917. The $2,000.00 that was paid at the time the lease was executed was applied on that rent by the defendant. The balance $1,600.00 has never been paid.

I left Clatskanie about the 5th of November. We had a very nice fall up to that time. After the pumps had been shut down, some time in July, there had been no complaint made to me up to November 5th about the weather in the district and asking me to pump. There was no reason that would require the pumps to be operated up to the time I left for the east. The water was low in the river, and it would drain out through the tide-gates plenty low enough for all purposes. Wak may have asked me to pump in the springtime, because it was the custom whenever they wanted the water pumped to notify me and I would take the necessary steps to have the pump started. I was not around to see whether it needed pumping, and he would notify me. I don't think he ever asked me to pump after July. There would be no necessity because the water was so low down in the river. I got back I think the evening of December 13, 1917.

A. And the Clatskanie River was up out of its banks, as everything was very wet. It had been raining hard for evidently a day or two. I met some of the Chinamen next morning at Clatskanie, and was presented with a letter from Seid Pak Sing in-

(Testimony of R. B. Magruder.)

troducing Lew Fook, I think, telling me that he would represent him thereafter.

I went out and saw the lands in the Midland District the next [174] day. The ground showed evidence of heavy rain. I don't remember whether anyone asked me to pump then. It is very probable they wanted the pumps started, but I would not say definitely.

Q. Well, what would have been the effect upon the ground where the potatoes were planted, if the pumps had been operated at that time?

Mr. RANKIN.—If you know, Mr. Magruder.

Q. If you know, yes.

A. Well, I could only say that I do not know at that time that they could not possibly have gotten the water out of the district had no more rain fallen, with the pumps in time to save the potatoes that were in the ground. About five days when potatoes are submerged on that land will make them turn black, and they will commence to rot when they are taken out in the air.

I talked to plaintiff at the time he came up after Christmas about the time it would take to destroy the potatoes under those water conditions. We discussed it at that time.

Q. What did he say?

A. Agreed that that was about the length of time and that the potatoes were gone at that time; at the time he got here the potatoes in the ground were gone.

Q. Please explain to the jury how those lands drain themselves naturally, how the water is allowed

(Testimony of R. B. Magruder.)

to escape from the lands, as it falls in rain, into ditches first, and follow it out into the river.

A. Well, the rain falls on the land, has to work, its way into the lateral ditches, and from the lateral ditches into the main ditches, and then of course leads to the lowest portion of the district, and there it has to be discharged and pumped over the district or through the tide-gates, over the levees or through the tide-gates under.

Q. Do you remember how the potatoes were planted in tracts 48 and 49?

A. Well, they were generally planted parallel with the ditches, the long way of the tracts. [175]

Q. Then which way did the furrows run?

A. The furrows would run parallel with the ditches.

Q. Now, would there be any escape of rain water by following down the furrows into the main canals in those tracts?

A. In those particular tracts it would be a little difficult to get out, or impossible, really, to get out the ends of the furrows, because along the ditch bank the land was a little higher.

COURT.—You mean the Canal bank?

A. The canal bank, the main ditch bank. That was formerly an old slough, and in plowing with the caterpillar, of course in turning on those ends packed it, and the way the water would have to go out would be sideways into the lateral ditches.

When plaintiff came up here in September or October, he met some members of the defendant at the

(Testimony of R. B. Magruder.)

office of defendant in Clatskanie. I recall that time, and also a conversation there regarding the Beaver District and about the financing of that for the year 1918.

Q. Please state that conversation as well as you can remember it.

A. Well, previous to that meeting Seid Pak Sing had talked the matter over with me, and I brought the question up for him at that meeting. And he had explained that he had difficulty in obtaining money from his California banks for outside enterprises, and asked me to inquire of my directors if they would back him to a certain extent, and I told him that I would introduce the subject at the next meeting and call a meeting for that purpose. The matter was discussed, and it was proposed that if he would finance three of the camps himself, why, the company would see what they could do toward helping him with the next three. A matter of $50,000 was the sum that was discussed. The impression was given that $50,000 was what he wanted.

I remember another conversation that was had between plaintiff and Mr. Brix and Mr. Byerly at the Oregon Hotel in Portland, between Christmas and New Years, 1917. At that time plaintiff cancelled [176] the lease, and the defendant agreed to it. Nothing was said by plaintiff at that time about any damages claimed under the lease.

Q. Did he say at that time that his potatoes had been drowned?

A. Yes; he thought that it was not worth while to

(Testimony of R. B. Magruder.)

do anything further with the potatoes that were down there in the ground, they had been in so long that it would be impossible to save any of them. I remember that distinctly, because Byerly turned to me, and said, "Is that so?" I told him I thought it was. He said, "Well, suppose you take out a few, go down there and take out a few and see whether it would be of any use' " that is, they would not rot. Well, in a week or so, I went down there, the water continued to fall, the rain continued to fall, fell all during the rest of that month, and January, almost as much in January as it was in December, if I remember right. I took out, but they all turned black and it didn't do any good.

I have had some experience in farming down there. I have farmed for the company down there previously and raised potatoes. The effect of the rains that fell in the late part of the year upon potatoes that are left in the ground is that if there is enough of it, it will drown them. *I* does not hurt potatoes to be dug in an ordinary rain. The only effect is that the mud sticks to them.

The cost of the buildings that constitute what has been called one unit on the Beaver District would be about $3,500.00 These buildings were designed particularly for the use of Chinamen.

Q. Would they be readily adaptable for the use of white men? How were they particularly adapted for Chinamen? That will cover it. How were they so constructed that they were particularly adapted for Chinamen?

(Testimony of R. B. Magruder.)

A. Well, the barn and the potato house could be applied to the white man's method of farming. The bunkhouse and messhouse were particularly adapted to the Chinese, the way they were constructed, long, narrow buildings. [177]

The reason why we did not put up more of these buildings upon this Beaver District was that the lease had been cancelled. We went ahead with the one and completed that. The lumber was all on the ground and the work was practically done, the contract practically all arranged for, and went ahead with it, thinking if these Chinamen did not take it we might use it another year for some one else.

Q. Did you understand at that time as late in the year as November or December that the Chinamen were going to take all of the 3,000 acres?

A. Well, at the time Seid Pak Sing was up there, and made arrangements, had that conversation in the office, it was arranged that he would put in, as I stated, the three camps, which would be 1,500 acres, and then when those were in, why the company would try to help him with the next.

Q. Mr. Rankin said when he opened this case to the jury that if the company had turned a wheel of the pumps, that this claim would never have been made. Now, if the pumps had been operated under those conditions, would it have done any good? Would it have saved those potatoes?

A. No, with the rain that fell; it would have been impossible to have saved those potatoes with the pump.

(Testimony of R. B. Magruder.)

COURT.—Suppose those potatoes had been planted on upland, where there is natural drainage, would that water have destroyed the potatoes?

A. I don't believe they would live through that January and February. It was December, January and February, the three heavy months of rain, I don't believe that hill land potatoes would have.

COURT.—Was there enough water fell in January that if the potatoes had been planted on upland, where there was natural drainage, that it would have destroyed those potatoes? I mean in December.

A. In December? I think so. I think they would have drowned out in December. [178]

COURT.—Suppose the potatoes had been planted on lands in the Willamette Valley, and on ordinary level land where there is natural drainage, would the rain in December have destroyed those potatoes?

A. Yes, anywhere on the flat land. The water stood in all low places, depressed places in the Willamette Valley that year.

COURT.—I have reference to land—

A. Land with ordinary drainage?

COURT.—Yes, with ordinary drainage, natural drainage.

A. It is my belief that in 1917 the latter part of December, potatoes left in the ground would not have wintered through so that they could have dug them in the spring. Now, Judge oftentimes potatoes that winter through left in the garden, you will dig up good potatoes, and if they are cooked immediately they are very fair potatoes; but leave them out in

(Testimony of R. B. Magruder.)

the air for a week or so, and they commence to get dark, and hard in the center, and soon go to pieces. They won't stand up.

Q. Well, Wak stated that they didn't plant more of the acreage in the Magruder District because it was wet. What is the relative condition of all the lands that you showed him in the Magruder District?

A. Well, they are practically the same. I think Wak must be mistaken in his reason, because at the time that they moved down to the other camp, why, it was in the drier season of the year; it was a good deal drier on the remaining tracts than it had been on the first tracts that they put into cultivation.

A. And he stated further that he didn't use more land in the Midland District because that land was wet and had trees and brush and stumps on it. What is the fact about the condition of the lands in the Midland District that you showed him, that he didn't use, as compared with those that he did use?

A. Well, some of the lands that he did not use were fully as dry as the lands that he did use.

A. What was the reason that they did not put more lands in in Midland [179] District, if you know, into potatoes?

A. Why, it was because they had put in all that they had seed for, and all that they had made preparations for. They put in all that they had land prepared for.

Q. Did they notify you to stop the use of the caterpillar for any reason?

A. Notified us to stop, because we had finished

(Testimony of R. B. Magruder.)

plowing all that they thought they could get in with their teams, all they wanted prepared.

(Examination by the COURT.)

Q. Assuming that the water had been so kept out of the drainage district that the canals were running freely toward the sump, and the natural drainage was taking place, would that rain that occurred in December have destroyed those potatoes, nevertheless? A. Yes, sir.

Q. According to your opinion it would?

A. If the water had been kept down to the bottoms of the ditches, as low as it could be with that amount of rain, over that absolutely flat ground, with 600 feet between ditches, the furrows parallel with the ditches, and the water in the furrows to the tops of the furrows, which of course was higher than the potatoes, it could not possibly have seeped that 300 feet on each side, and gotten into the drainage ditches within five days.

It would not have drained naturally sufficiently to save those potatoes. I wish to explain a little more regarding the nature of that land there. The interior where these potatoes are planted is of a peaty formation. In the summer time if fire gets out in there, it will be burned, burned down quite deep in places. We could go on there at almost any season of the year with a hoe handle, and the weight laying the hoe down to the blade you can press it down four or five feet. That is on the interior. Around the slough bank where the sediment is thrown up, that peat formation is down lower. [180]

(Testimony of R. B. Magruder.)

(By the COURT.)

Q. You judge from that, then, that the drainage is not rapid, but rather slow?

A. The drainage, it becomes fully saturated, and the top, where it is worked up and loose, and the water gets on there, has a tendency to float. It will rest almost on the surface of the water. It becomes entirely saturated. Well, then, after it rains for a period such as it did there in the last of December, a man could not carry out a sack of potatoes on his back.

Cross-examination.

The ditches on each side of this tract were about 632 feet apart. Those ditches on the side were kept clean.

Q. That is, a peat soil, as you describe, but is it not filled with what they term voids that the water will percolate down through to what you might term the water table underneath, very rapidly?

A. Well, there is no water table under that till you get down to clay, which is anywhere from four to six feet. But the top part is formed of decomposed vegetation, and that is more like a suspended—it holds the water. While it will drain out into the ditches when they are close together, yet all of the water that would fall in the center of those tracts, with the ditches 600 feet on each side, would have to percolate through this 300 feet before it would get into the—

Some of it would have to percolate through 300 feet; that part that was in the center. The water on

(Testimony of R. B. Magruder.)

the side would percolate rather rapidly into the ditch. But with the ditches that far apart, there is other water in the center coming in to take the place of that that is drained out through capillary attraction. Those ditches on the boundary lines made permanent divisions between the tracts.

Q. You spoke of some of the lands that were offered were as good as those that were used. This is, as to character of soil? A. Yes.

Q. How about the area of them? Were they as large as those that were used?

A. Well, some of the tracts were. Others were not.

Q. The largest cleared tracts down there run through lots 48, 49 up to 55, through that section, do they not? A. Yes.

Q. Those are out there in the meadow, where the land is open, this constituting the fence on this side? Towards the Willows Channel? [181]

A. Yes, that was the largest.

Q. And toward the Westport, running down here to the main slough. A. Yes.

Q. That is the largest open area on the island, isn't it? A. Yes.

Q. Now, these other tracts like 45, 46, 49 and 80, they are smaller in area, are they not?

A. That is, the area of the cleared land is smaller.

Q. That is what I had reference to? A. Yes.

Q. In other words, there is brush and trees and stumps around those, so that they do not have the same open area that these lots 49, 50, etc., have.

(Testimony of R. B. Magruder.)

A. That is correct, sir.

Q. When Mr. Sewall asked you about Wak's reasons for leaving the Magruder District, you said you thought he was mistaken in his reason. What was his reason for leaving the district, other than wet land?

A. Well, the reason Mr. Sewall stated that Wak gave for leaving was that the ground in the Magruder District was too wet.

Q. Well, what was his reason for leaving.

A. Why, I think the reason was that the camps had been completed on the Midland District. The accommodations were a little better, and they had the larger area there, and wanted to concentrate their work all on one district, the rest of the work on the district.

Q. Would the pumps take off that rainfall of November and December, practically take care of the rainfall of November and December, on that property?

A. Well, up to those heavy rains. Now, the capacity of the pump is, for 24 hours run, is half an inch over the entire surface.

Q. Just answer the question now. Would the pumps practically take care of the rainfall on the Midland District as it occurred in November and December, 1917, if they had started operating?

A. They would have taken care of all of the rainfall, kept it down to a depth below where the tidegates could possibly operate up to the 12th or 13th of December, when that heavy rain came.

(Testimony of R. B. Magruder.)

Q. December? A. Yes. [182]

COURT.—Does that take into consideration the evaporation?

A. Of course the evaporation would have less to do—

Q. Does it take into consideration the seepage?

A. Oh, yes, yes. The seepage is very nominal.

Q. Would they practically have taken care of it for all practical digging purposes for all the rest of the month? A. No.

Q. That is your opinion of it, Mr. Magruder? You never figured it out?

A. No, it is an easy matter to figure. The total rainfall for the rest of the month was greater than the capacity of the pump.

The building on the Beaver District was started just before Christmas. The material was on the ground, just after I got back. They started to erect the buildings before the first of the year. The material was all on the ground, practically all unloaded, and the foundations were in. It was raining very hard during the latter part of December, and not able to work full time. The exact data on that can be ascertained by the time sheets of the company.

Q. The only point I had in mind was this, Mr. Magruder. That was to be ready for occupancy on the first of January, 1918, wasn't it, under the lease? The lease speaks for itself on that. You can take that for a fact, I think. A. Yes.

The material was not on the ground until just a few days before January 1st, and the lease was can-

(Testimony of R. B. Magruder.)

celled by plaintiff on or about December 27th. The defendant doesn't claim that it went ahead and erected this building on the representation that plaintiff was to occupy it. The reason why they did not build the other camps was they had no arrangements made for anyone to occupy them. This lumber was all dimension material made for these particular camps, so the contractor went ahead and constructed them.

While I was away Mr. Clark was the trustee in charge of the district. It rained considerable in March—naturally would. The lands were wet at times in April when it would rain. I don't remember the exact dates when you could get crops in in the spring of 1917. I think the Chinese got their crops in as early, started as early as they could reasonably do so with respect to their ground in the spring of [183] 1917.

A. They were unfamiliar with the rains when they first came up. They got more used to them afterwards, and would work in rains later on that in the very beginning they thought it was too wet for them to go out. Later on they got accustomed to them and went out. So I think that they could have made a little more progress in the beginning with the same amount of help.

Q. You pointed out these lands. Did they at that time say they would take them, either Mr. Seid Pak Sing or Wak, did they say right there on the lands they would take those as you pointed them out?

A. No, there was nothing definite said. The lands

(Testimony of R. B. Magruder.)

were pointed out. There was a surplus there and they could select the tracts that suited them, put in what they wished to.

Q. (JUROR.) Out of the 500 acres that you said was open for cultivation, was there 400 acres that could have been at all times ready for tillage?

A. Yes, as much or more.

JUROR.—Of the 500, 400 acres of it? A. Yes.

When plaintiff was up to Portland, I did not ask him for the rent. I felt satisfied that he intended to pay it. I have testified to advancements that were made by the defendant after the lease was cancelled. The company was willing enough, in fact, wanted Seid Pak Sing to stay on there and farm the lands. I sent the following telegram to the plaintiff, said telegram being offered in evidence without objection and marked Plaintiff's Exhibit 10:

Plaintiff's Exhibit No. 10.

"Clatskanie, Wash., Jan. 27, 1918.

Seid Pak Sing,

762 Sacramento St.,

San Francisco, Cal.

Directors meet next Friday. Your letter 5th will be submitted. Please write or wire fully explaining your proposal to rent smaller acreage in Beaver, and your wishes regarding Midland Camp. The tracts west of Midland Camp can be rented sixteen dollars per acre. Explain also your proposal made through Mr. Low to purchase part of Beaver, so all can be fully understood and acted upon decisively Friday.

R. B. MAGRUDER." [184]

(Testimony of R. B. Magruder.)

Q. You spoke of Seid Pak Sing, Mr. Magruder, not claiming any damages at the time he was talking to you. Do you know whether or not a proposal or suggestions were made to him that everything would be all right?

A. I don't remember anything—if you can define any particular time.

Q. Well, at the time, December, when he cancelled the lease Mr. Sewall asked you if Seid Pak Sing had made any claim for damages, and I am asking you at the same time, do you know that they had told him everything would be all right?

A. Why, there were no claims for damages, no questions, one way or the other, in regard to that. I don't remember of anything coming up. Everything was perfectly pleasant and agreeable at that meeting.

Mr. Low was present at the conversation when the lease was canceled. I don't remember his asking plaintiff if he would not settle for $2,000.00. I was present at the organization of this district. My position always has been that the landowners were separate and above the trustees in authority, and I made that plain while representing the company. I think that this association was in the nature of a partnership.

Defendant rests.

PLAINTIFF'S REBUTTAL.

Testimony of Ah Yip Wak, for Plaintiff (Recalled in Rebuttal).

AH YIP WAK, recalled for the plaintiff in rebuttal.

Direct Examination.

I never leased any land to Mr. Pierce. I don't know him. There was no serious killing frost in October or November, 1917. None of the potatoes froze. It nipped a small part of some leaves, but two or three weeks later they survived. The frost did not kill down the potato vines, but just a few of the leaves.

Testimony of Seid Pak Sing, for Plaintiff (Recalled in Rebuttal).

SEID PAK SING, recalled for the plaintiff in rebuttal.

Direct Examination.

I never got any rent from any lands there outside of the division of the hay on the hay tracts. I don't know whether Wak [185] or Seid Chung got any rent for any lands. They never paid me any.

Testimony of J. B. Gongwer, for Plaintiff (Recalled in Rebuttal).

J. B. GONGWER, recalled for the plaintiff.

Direct Examination.

I am a hydraulic engineer. When I was down to the Midland District October 11, 1919, I examined the pump of this district and the size of it, the make of

(Testimony of J. B. Gongwer.)

engine which drove it, and general characteristics of the tide-gate structure. I have the Government data on the height of the Columbia River and the Government data disclosing the rainfall during November and December, 1917.

Q. Out of your knowledge of the pumps and those Government records, have you made an estimate as to whether or not the pumps would take *d*are of the rainfall?

A. I have made some computations covering that point.

Q. You have read Mr. Magruder's testimony as transcribed by the reporter? A. Yes, sir.

Q. Now, state what your conclusion is, or state what your data is, Mr. Gongwer, as to what action the pumps would have on that rainfall.

A. I think I have that same information in another form, from consulting the climatological data of the United States Weather Bureau, in which is given the rainfall for a number of weather stations, throughout different parts of the United States.

Q. Is this it? (Handing witness paper.)

A. Yes, if you please. The town of Doraville is in the near location of the point on the map which is in question as the location of this Midland District, and the rainfall for that month and for several months, I have indicated in a table.

Mr. CORLISS.—What year, please?

A. For the year 1917, for the months of November and December; also in this table running over into January. From the 17th of December, on which date

(Testimony of J. B. Gongwer.)

occurred at Doraville a precipitation of 1.98 inches, I have started with that date and added up the precipitation day by [186] day, summing it up, the total rainfall after the 17th of December; on the 31st of December that would amount *of* 10.42 inches. Carrying that further on, it might have some bearing; I carried it on to the 23d of January, when the period of that long storm was spent, and on that date the total rainfall, from the 17th of December to the 23d of January, was 16.86 inches. I believe I saw in Mr. Magruder's testimony, which I have read, that the guaranteed capacity of the pump at the tide-gate was 10,000 gallons per minute. Figuring the area of the Midland District as even 1,300 acres, which I checked by adding all the lots, that figured, I believe, 1,295 acres—and if I am correct in my knowledge, the areas given on the plat for the lots are entirely outside of the areas of the sloughs; roughly figured, there is something like 42 to 45 acres of sloughs, perhaps, in that district. Now, there is a portion of the Midland District situated from the true shoulder, or berm, or bank of the levee or dike, so that the water or rainfall from it would drain outward into the slough and not backward into the district; that would very closely approximate the area of the slough, and leave the total area within the dike as 1,300 acres. I think that is a close assumption and is close enough that it would not make any difference in the results. The capacity of a pump pumping 10,000 gallons per minute would be equal to 22.28 cubic feet per second, or 44—well, I will leave off some of those equivalents,

(Testimony of J. B. Gongwer.)

but it can be deduced, and if the jury or any one desires, I can show the process by which the equivalent is derived. But 10,000 gallons per minute amounts to .408 of an inch in 24 hours over 1,300 acres.

JUROR.—Give that result again.

A. Practically .41 inches.

JUROR.—A litle less than half an inch?

A. A little less than half an inch. About five-twelfths of an inch. In other words, the pump in one day, running 24 hours, would take care of a half-inch of rainfall if brought to it; brought into the sump [187] where the pump could reach it, it would carry one-half or .41 of an inch, in nearest figures, out of the district. Now, starting at the 17th of December, and merely by process of multiplication, one day, two days, three days, multiplying by one, two, and three, or adding .41 inch day by day, on the 31st of December ,the pump would have unwatered from the district 6.12 inches of rain; that is, of the rainfall which had fallen. Now, in the first column in this tabulation, I have just stated that at the 31st of December, there would have been 10.42 inches of rain fallen in the district according to the weather reports, of which the pump would have relieved the district of 6.12 inches, leaving upon the district 4.30 inches of rain.

Q. That is on December 31st.

A. On December 31st. On this table, if it is desires, any other day of the month, or day of January, the results can be taken off, how many inches of water over this 1,300 acres, or to be exact, how many inches of rain has been unaccounted for by the pump. On

(Testimony of J. B. Gongwer.)

the 23d of January, when the rain had practically stopped for that period, there had been a total of 16.86 inches of rain fallen, of which the pump should have been able to take care of 15.50 inches, leaving 1.36 inches of rainfall unaccounted for on the district. That means the pump would have practically kept up, and would have caught up. If the water which the pump could not take one day remained on the district, on the 23d of January it would have removed all but 1.36 inches of rain. And the greatest amount of water left on the district during that time would have been 4.3 inches of rain on the 31st of December.

Now, the reason I have started adding the rainfall from the 17th of December is the fact that I have come to the conclusion that the tide-gates should have been giving material benefit up to the 17th of December. I have a Pacific Coast tide-table, in which the tide is given for the port of Astoria through the year 1917, and in December—well, first I might explain by saying that the rainfall, [188] starting with the 26th of November there was no precipitation; 27th, one-tenth of an inch; 29th, .80 inches, and running down the line, on the 4th of December, it was .84 inches; on the 13th there was 1.82 inches; on the 14th, 1.24 inches. Several of those—is quite a lot of water. However, the tide-gates, there are four gates there, of which I could not see the size, but it has been testified that they are 4x5 openings, and if desired I can go through the computation to show, but I am satisfied it was a very small head, those tide-gates, and in a matter of a couple or three hours those tide-gates

(Testimony of J. B. Gongwer.)

would relieve the district of a great amount of rain if brought to it. In fact, 1,82 inches of rain on the district would go through the tide-gates in a very short time if the tide-gates had sufficient fall, a matter of half a foot or a foot, and I think they would have more than that, because the sump would be comparatively full. I am about to show from the tide-tables that on the 13th and 14th, starting in on the 12th, one of the low tides at Astoria was zero, and from that day on, on the 13th, there was a minus 5/10 tide; on the 14th, a minus 7/10 tide; on the 15th, a minus 8/10 tide; that is eight-tenths of a foot below zero; on the 16th, a minus 8/10 tide; on the 17th, minus 5/10 tide. The 17th is the time when I have assumed that the tide-gates ceased to operate, on account of information concerning the rise of the Willamette River, which I will also explain.

Mr. CORLISS.—What was that last date?

A. On the 17th there was a minus 5/10 tide at Astoria; on the 18th, zero tide at Astoria. Now, a tide of 8/10 below zero means that the water at Astoria would be below zero for some little length of time; it would not be for just a few minutes. I have plotted up, drawn on paper a curve representing the height of the water. Should I show this to the jury?

Q. Yes, to explain your testimony.

A. It can be examined at your leisure. But the heights of the tides are shown for each hour of several days which have the lower tides— [189] December 12, 13 and 14. There are twenty-four of these vertical lines, representing 24 hours to each day. 15th, 16th,

(Testimony of J. B. Gongwer.)

December 17th, is below this line, and 18th and 19th. Now, up to December 17th you will see below this heavy line here which is marked zero—and perhaps I had better mark zero on this one, because that is what is intended, zero elevation—why, the tide is below zero for a length of about two hours; if you will closely observe the distances between these horizontal lines, the tide is below zero for two hours or better. Here it is nearly 2½ hours; here it is a little over two hours. (Referring to diagram Plaintiff's Exhibit 11.)

I believe it has been testified that when the Willamette River was below the stage of 12 at Portland and there was a zero tide at Astoria, that the tide-gates would function up to that time, and some action should be expected of the tide-gates up to that time; and in ordinary stage of the river, it would not require a zero tide for the tide-gates to operate. Of course, I understand, and I think every one does, that there is a number of things—and they are very hard to determine—which enter in to the relative elevation of the river at Clatskanie and on the Midland District, but I assume that the gentleman, Mr. Magruder, who gave that testimony, has observed the operation of those tide-gates for some time, and that that has been the usual fact, that when the river at Portland was below 12 and there was a zero tide at Astoria, the tide-gates were working.

Q. What period of time did you figure that the tide-gates would take care of the drainage of the district?

(Testimony of J. B. Gongwer.)

A. In what length of time they would take care of—

Q. How long would they be taking care of the drainage district?

A. On the 13th of December, when there was 1.82 inches of rainfall, if that is figured over 1,300 acres, it means 197.1 acre feet; in other words, 197 acres of that 1,300, if the water was piled up, would be covered one foot deep with water. An acre foot is a unit of measure. Any one that is familiar with irrigation or drainage, a number of those [190] water computations, will recognize it. It is water one foot deep spread over an acre. On this 13th day of December, when the greatest fall of rain occurred, there was 1.82 inches of rain, equal to 197 acre-feet. On the 13th of December—this information will all have to be considered together, and if desired, after I make the statement, I will support it with reference to the gauge of the Willamette River at Portland; but the Willamette River on the 13th of December was fairly low; it had not started to rise on this particular high water. And with that heavy rainfall inside of the dike, inside the Midland District, coming down the sloughs and drainage ditches, you would have quite a little head inside of the dike; and with minus—I think 8/10 tide at Astoria, that occurred on the 13th of December—a minus 5/10 tide—and I would assume that you would have a foot and a half to two feet head at least in the district; if you had two feet head, I computed that the tide-gates would deliver 1,080 acre-feet, and the rainfall only equaled 197 acre-

(Testimony of J. B. Gongwer.)

feet, which would require about four hours of running. That would show that perhaps the tide-gates on the 13th of December would not care for the entire rainfall on that one day.

COURT.—Would not?

A. They would not quite care for it. I will qualify that statement, however, by saying that it is almost impossible to say what the head on the tide-gates would be at that time. If they did not care for it, I believe that I am a little previous in making that statement; that if they appeared to be overtaxed, why the head back of the tide-gates would rapidly increase as this considerable flood came down, assuming that it ran off reasonably rapidly, but it all would not run off in that day; some of it would be retained in the slough and would come out slowly on the next succeeding days; but even if it came out all at once it would fill the sump and the sloughs, and channels leading to the sump, to such an extent that there would be considerable head, two or three feet, perhaps back of the tide-gate, and that would increase [191] the discharge to such an extent that I really believe it would take care of that rainfall in 24 hours if brought to it. However, on the 14th of December, there was a less rainfall—1.24—and on the 15th there was .34 inches and on the 16th, .51, and on all of those days there was considerable minus tide at Astoria, which would allow the tide-gates, if they had been overtaxed on that one day, to readily catch up. That is my basis for my statement that I think the tide-gates would amply care for the rainfall up until the 17th of De-

(Testimony of J. B. Gongwer.)

cember, without any assistance from the pumps.

JUROR.—Might I ask one question there? Could the Columbia River be high, and not show in the Willamette? If the rain had not fallen up this way, and still the Columbia was high enough to operate to disadvantage there.

A. If the rain had not fallen up this way?

JUROR.—Up this way, yes. I know sometimes the river does not back up when the Columbia is high.

A. Let me get it straight. I understand what you are driving at.

JUROR.—I am asking just for information.

A. I am very glad to give anything I can. Now, your question was, could the Columbia rise and the Willamette not?

JUROR.—Yes. You spoke about the Willamette here, but you did not say about the Columbia.

A. Well, that could happen. Also the Willamette could rise, and the Columbia not. However, on this particular occasion, they all rose, and if desired I can refer to a table of river gauges, which would show that, that the Columbia and the Willamette and the Columbia at The Dalles rose.

JUROR.—I think that would be a fairer thing.

A. Yes, they all rose. The slope in the river is a fairly gradual slope from Vancouver, Washington, down to the mouth of the river, so the effect of flood to some extent is proportionate to the distance from the mouth of the river up to Vancouver. Now, that may be varied [192] slightly by the swelling, if one river is flooded more than another. This seemed to

(Testimony of J. B. Gongwer.)

be a general rainfall over the entire Columbia Basin. Now, referring to the gauges of the Willamette River at Portland, which are printed in the annual meteorological summary of the Weather Bureau, the Willamette River in December was comparatively low up until the 13th and 14th. The 14th it reached 7.4 on the gauge, and the 15th, 9.4, and the 16th, 9.5, on the 17th, 9.9, and from that day on, the 18th, it went 12.6, and it went from that point up to 19.3 on the 21st, and dropped back again to 13.9 on the 26th, and reached 19.3 on the 31st. That is all matter of record. I believe that has been presented.

Mr. CORLISS.—Yes, it is in evidence.

A. Yes. It is my opinion that the pumps, if run, if started on the 17th of December, would have operated materially towards relieving the district of water. In fact, I don't know what date is in question, or what dates—probably this whole period,—while the total rainfall after these tide-gates stopped operating, started with two inches on the 17th, and ran up to 10.4 inches total rainfall on the 31st, with the pumps running it would start with 1.54 inches of rain left on the district on the 31st of December. From that point it would lose again for a day as a heavy rain came, but places it would lose again for a day as a heavy rain came, but it would catch up with the rainfall again until the 23d of January there would be 1.36 inches of rain left unaccounted for on the district. The effect of that amount of rain on the land is somewhat difficult to say. I made a slight com-

(Testimony of J. B. Gongwer.)

putation on what I think would probably happen with that rainfall.

COURT.—That is the evaporation?

A. Not the evaporation, no. I don't think any evaporation would take place, on account of the humidity of the atmosphere. At least there would be no sun to speak of, and very little opportunity for rainfall to evaporate at that time. There might be some slight amount, but it would not evaporate greatly, as in the summer. [193]

COURT.—Would the wind have any effect on evaporation?

A. Yes, it might. But I have neglected to take it into consideration because I thought it would be comparatively small—the effect would be comparatively small, and I was attempting not to make by conclusions too theoretical and fine drawn, because there might be other slight things that would enter in there that would affect it more.

COURT.—Very well.

A. I will refer to a book on Soils by S. W. Fletcher, professor of horticulture in the Michigan Agricultural College, from which I have merely arrived at the probable amount of open pore space in this kind of soil and the amount of water it naturally holds, such as could hold when rainfall dropped on the surface and percolated down; also how much water it would hold when thoroughly saturated. On page 26 of this book he refers to some other authority whom he quotes to say that garden soil rich in humus weighs about 70 pounds. That is an average weight, under-

(Testimony of J. B. Gongwer.)

stand, 70 pounds per cubic foot when dry. Peat soil 30 to 50 pounds. And on page 31 of this book, he says: "The capacity of a soil to hold water depends upon its composition and upon its texture. The lighter the soil is, or the more sand it contains, the less water it will hold. The smaller the grains, the more water the soil holds, since there is more surface for it to cling to and less likelihood that it will leach through." This is a little outside, but I am reading the entire paragraph to get what I mean. "Each soil grain is surrounded by a film of moisture; if there are over 168,000,000,000 grains in an ounce of soil as in some alluvial soils, the amount of surface for the water to cling to is much greater than if there are but 56,000,000,000 grains in an ounce, as in some truck soils. The more humus the soil contains, the greater is its water-holding capacity, for humus is vegetable sponge. If small quantities of several kinds of soil are completely dried in an oven, and water is then added to them, it will be found that they will hold about the following amounts." [194] Amongst other things, he starts out with "Sharp sand, 25%.... Garden mould 89%....Humus 181%." This does not mean the film moisture, but the entire thorough saturation of the soil, as he adds a little further on: "It is far more important to know how much water a soil will hold under its natural conditions in the field, after the excess water that fills the spaces had drained away and only film moisture remains." Which merely supports the fact that these percentages given are for entire saturation.

(Testimony of J. B. Gongwer.)

Now, in making a computation here, I have taken according to this book, and you will find by consulting various authorities, that the weights of soils of this nature vary greatly, and possibly the porosity of the soil varies greatly, and the computation I make is representative, I think of an average of all the soils, and I think it would be very close to the conditions in this soil, and I have assumed that this soil when dry, in this computation, weighed 40 pounds per cubic foot.

JUROR.—That is humus, is it?

A. Yes, soil such as this.

JUROR.—Character of the soil of this particular district.

A. Well, 40 pounds per cubic foot is average between peat soils.

JUROR.—It is average of the peat soils?

A. Yes, this author gave 30 to 50 ponnds, and I have not the benefit of any tests or weights on this particular soil, but I selected 40 as being probably the mean of the weights when dry of this soil. The upper surface of it seems to be full of undecayed vegetable matter, while the lower portions of it are perhaps tighter. The soil varies as you go down in depth. I just quoted that he said soil rich in humus may hold 40 to 50 per cent by weight of film moisture. I have taken the lower figure 40 per cent. If the soil weighing 40 pounds contained 40 per cent of moisture, that is, when not thoroughly saturated, but just held it on the top of the soil, 40 per cent of its weight will be retained on the soil, I think it will drain out if allowed opportunity, [195] if there is drainage.

(Testimony of J. B. Gongwer.)

If it contains 16 pounds of water per cubic foot, which is 25½ per cent of one cubic foot of water, water weighing 62½ pounds, or three inches of water. That is, it would naturally contain, like a sponge, the amount it would naturally contain, would be about three inches of water, if saturated as by rain falling upon surface and going down through several feet of it and draining out sideways, there would be about three inches of water, if strained out of it, to every foot of soil. Its total saturated content, I believe here it was given as from 89% to one hundred and some odd per cent, but I have selected 100 per cent as being representative. If you saturated the soil thoroughly, it contained perhaps 100 per cent by weight, or the soil weighing 40 pounds would contain 40 pounds of water; dividing forty by the weight of a cubic foot of water, 62½ pounds, would give 64½ per cent by volume. That is, a cubic foot of this soil if immersed in water, submerged, would take up 64½ per cent of its volume of water.

Mr. CORLISS.—Let me ask you a question there to get my mind clear. Can you state how many inches of water that would be equivalent of?

A. 64 per cent.

Mr. CORLISS.—Yes, I would like that. You gave the other in inches.

A. Yes. 25½ per cent would be nearly three inches of water for the first one, and this 64 per cent would be about 7.7 inches of water. I would refer to a paper printed in the proceedings of the American Society of Civil Engineers for February, 1918, a

(Testimony of J. B. Gongwer.)

paper entitled "Determination of Duty of Water" by W. C. Hammatt, Member of the American Society of Civil Engineers and recognized in this country as an authority on engineering matters, irrigation matters and things connected therewith, on the Chewaucan marshes I believe in Lake County, where he made a determination. He said this was a peat soil. "The soil of the Chewaucan Marsh consists of a layer of true peat, from one [196] to four feet thick, underlain by a few feet of mixed soil, under which occurs a bed of chalky soil of great depth." That is one to four feet thick, and they made a test of the porosity of this soil; in other words, the voids in it; and they made excavation four feet deep and placed in this excavation a water tight box, and the box was accurately measured. Drying the earth and placing it back so it occupied the same volume, and then thoroughly saturating it, they arrived at 58 per cent by volume. That is, that kind of soil would hold 58 per cent of its volume of water. In this case I have arrived at 64 per cent from another authority which fairly closely tallies.

COURT.—Fifty-eight per cent would produce how many inches?

A. Fifty-eight per cent would produce 6.96 inches.

Mr. SEWALL.—That means depth in every foot.

A. Yes, in every foot of soil. If that water was evaporated out and caught again out of a cubic foot of water you would have, over a square foot, you would have 6.96 inches of water. That is, it would hold over half of its volume of water.

(Testimony of J. B. Gongwer.)

Mr. SEWALL.—This soil that was four feet deep would be half full of water?

A. A little over half full of water if you could get the ground out of it again. Now, up to the 17th of December, 8.68 inches of rain had fallen since the first of December. I have not included a slight amount there in the latter part of November, but the result is all the same, that this rain has drained off in all probability and gone through the tide-gates, what has not been retained in the soil. November was comparatively dry, and the Columbia River was below normal during the month of November, so I would assume that the tide-gates had done good execution during November, and the ground at the latter part of November should have been in about as dry a condition as it would be at any time during the year. Now, this rain previous to the 17th of December would have given this ground about all the water it wanted for the time being, and the tide-gates taking it off *day by* [197] would have removed considerable of the surface water, and left the soil comparatively saturated; that is, the soil would have had in it for a certain distance down, this 25½ per cent of its volume until it reached a plane of saturation, the depth of which would be uncertain without accurate wells being dug and accurate measurements being taken. But from the fact that the ditches are from 3½ to 4 feet deep and perhaps 600 feet apart, and when properly drained there would be several inches of water in them, I would assume that the plane of thorough saturation would be perhaps, at the first of

(Testimony of J. B. Gongwer.)

November two feet from the surface. I think it might be more.

Mr. SEWALL.—The first of November or first of December?

A. I should say the first of December. That is a mere assumption on my part. I am trying in a way to explain what would become of this water which fell during December, and from then on. The surplus of that water, a great deal of it, would have found its way sideways into the drains and been removed by the tide-gate up to the 17th of December. The two feet then of moist soil, say, an average of two feet in the center of the tract, it might be a little less, and it would be about 3½ feet at the side ditches if the tide-gates were emptying them regularly, which I assume they probably were. The two feet of moist soil above this plane of saturation could contain—it now holds 25 per cent of water, and it is capable of holding 64 per cent of water. In other words, it could retain in addition 39 per cent by volume of water. I will explain that again to make it more clear. I have shown that an average soil of that nature, if thoroughly saturated, would hold 64 per cent of its volume in water, in that neighborhood, but if lifted up out of water in which it was submerged and allowed to drain, it would then probably contain about 25 per cent of its volume of water; and this rainfall during the first of December would have left the soil in that condition, probably, containing about 25 per cent of its own volume of water above the water table or plane [198] of saturation, wherever

(Testimony of J. B. Gongwer.)

that happened to be, and is soil capable of holding 39 per cent by volume more water before the water would flush to the surface. On the 31st of December, if the pumps now had been operating since the 17th, and the tide-gates had ceased to function at that time, there would have been 10.42 inches of rain fallen on the district, of which the pumps could have removed in the neighborhood of 6.12 inches of rain, leaving on the district 4.3 inches of rain unaccounted for; to be exact, 4.29 inches of rain. I have two sheets here on which the same computation is made by different methods. The amount that failed to check is .001 inches, so far as the general result is concerned, in this other sheet I have called it 4.29 instead of 4.3. Now, the 4.29 inches of rain left unaccounted for by the pumps, then, of this would saturate, of this upper layer of ground which now was not thoroughly saturated, 4.29 divided by .39, or about 11 inches of that ground. That is, if 4.3 inches of rain which had fallen since the 17th of December had not been cared for by the pumps, certain portions of it every day, the pumps had failed to take off, it had fallen on the ground and sunk in, that would have run to the ditches, and it would be capable of saturating, if the ground already contained 25 per cent of moisture and was capable of containing 39 per cent more, that four inches of rain would have saturated 11 inches more of that ground. Now, the effect on the surface of the ground would depend on where the water table was at the time, on the 17th of December and it is reasonable to suppose that, with the tide-gates operating

(Testimony of J. B. Gongwer.)

and porous *soul* of that nature, considerable of that water would drain off, and on an average over the entire area the water table would have been at least two feet, probably more, probably two feet below the surface at the center of the tract, it would leave 24 inches minus this 11 inches which has now become thoroughly saturated by virtue of the fact the pumps did not remove the water, it would leave 13 inches of ground on the surface that would be comparatively moist; it would have 25 per cent of water; and 25 per cent of water—I do not [199] wish to take the time, but I think in this same book which I have submitted here,—is not detrimental to plant growth. It may be that it would contain more water, depending on the nature of the soil and other things. For instance, to determine it on the same basis, if the pumps had not operated, the 10.42 inches of rain which would have fallen after the 17th of December, divided by 39 per cent, would have saturated 26.7 inches of soil above the water table. Now, I have already assumed that the water table was perhaps two feet below the surface, but 26.7 inches of more soil saturated would have brought the water to the surface, and the land would have been flooded. From that I think I am warranted in the assumption that the plane of thorough saturation would have been about two feet below the surface, because I believe it has been testified that the ground was about flooded several inches, perhaps some points higher than other would be drowned, other lower points might have more than two or three inches of water on the surface.

Plaintiff offered in evidence Plaintiff's Exhibits 11,

(Testimony of J. B. Gongwer.)

12, and 13, and the same were received without objection.

The first column in Plaintiff's Exhibit 12 gives the dates, the second column the rainfall in inches on those dates; the third column the total rainfall each day being added, and shows how far the tide-gates took care of it—for example, up to the 17th, they would take care of it. And the 4th column shows how the pumps would take care of that which the tide-gates did not take care of. And Plaintiff's Exhibit 13 shows how much water would be on the soil each day, not counting its absorption. I took this from the Government records.

The above parties having rested, the defendant requested the Court to instruct the jury as follows:

The jury are instructed that the plaintiff is not entitled to recover anything on account of the first cause of action set forth in the amended complaint herein, being the cause of action for damages to plaintiff's potato crop. [200]

The Court refused to instruct the jury as requested, and defendant thereupon excepted to said ruling of the Court, and such exception was duly allowed.

The defendant further requested the Court to instruct the jury as follows:

The jury are instructed that the plaintiff is not entitled to recover anything on account of the second cause of action set forth in the complaint herein, being the cause of action for alleged damages on account of the expenses on account of certain men claimed to have been sent from California to Oregon to work on the Beaver Drainage District. The Court

refused to give the instruction requested, and thereupon the defendant excepted to the ruling of the Court, said exception was duly allowed.

Plaintiff requested the Court to instruct the jury that the defendant was not entitled to recover anything on account of its first counterclaim of $1,600.00 for unpaid rent, and that the defendant was only entitled to recover rent for the land actually used by plaintiff on the Midland and Magruder Districts. Defendant at the same time requested the Court to instruct the jury that they must allow the defendant the full amount of said counterclaim, to wit, $1,600.00, being the balance of the full rent, or $3,600.00 for the land in the Midland and Magruder Districts.

The Court refused to give the said instruction requested by the plaintiff, and stated that it would give the instruction requested by defendant, and thereupon plaintiff duly excepted to the said ruling of the Court, and said exception was duly allowed. [201]

Portland, Oregon, October 21, 1919.

Instructions of Court to Jury.

Gentlemen of the Jury:

You are to be congratulated that we are nearing the end of this long contested case. Of course, it has been necessary to take up the time that has been taken in order to get the facts before you as the evidence in the case required, and hence we must proceed with patience until this case is concluded. It now becomes the duty of the Court to instruct you touching the law of the case, so that you will be enabled, by the application of the law as given you by the Court, more

readily to determine what the evidence in the case has proven as to the disagreement between the parties.

Now, this case arises out of a lease that was executed between the defendant company and the plaintiff, Seid Pak Sing; the plaintiff claiming that the defendant has not carried out certain obligations or covenants that were contained in the lease on the part of the defendant company.

It is not necessary for me to undertake at this time to construe the lease in its various phases. It is sufficient that I call your attention to the obligations of the defendant company on its part under the lease, and of the plaintiff on his part to exercise good husbandry in planting his potatoes, and in digging them and harvesting them when ripe.

Now, the complaint alleges that this lease was entered into by the parties to the action, and it alleges furthermore that the land described in tract 1 and tract 2 of said lease was, at the time of the making of said lease, "reclaimed land, and land around which levees had been built by defendant and its predecessors in order to reclaim said property from water"; and it is further alleged that, owing to the character of said property, "it was necessary for defendant to install or provide for the operation of pumps on said property to care for the surface water and the rainfall which would fall thereupon, and to pump and provide for the pumping of said rainfall and surface water from said premises in order to keep said premises in condition for agricultural purposes, and for the purposes for which said premises were leased as aforesaid by plaintiff; that defendant had installed or pro-

vided for the operation of and could secure the operation of pumps upon said [202] premises for the purposes aforesaid, but failed to operate or provide for the operation of said pumps." Then it is further alleged that subsequent to the execution and delivery of the lease, and within a reasonable time thereafter, plaintiff proceeded to the property described as tract 1 and selected certain lands in the Midland District; and that plaintiff entered into possession of 200 acres thereof, and proceeded to plant 48 acres and more of the same to potatoes, and in the course of such planting caused said land to be prepared in a proper and efficient manner, and subsequent thereto cultivated and cared for the said crop. Then it is further alleged that after the crop of said potatoes had fully matured and was ready for digging and harvesting defendant permitted surface water and rainfall water to gather and flow upon said 48 acres to such an extent that the said water drowned out the crop of potatoes; that the said water so flooding said land did not come through a break in the levee surrounding said property, but was surface and rain water that the defendant company was obliged under the lease to drain from the land, keeping it in condition so that the crops might be harvested. Then it is alleged that the defendant company failed and refused to perform its duty in the respect of drainage of the land so that the crop might be harvested, and that by reason thereof the plaintiff lost his crop of potatoes on the 48 acres. I will say to you here there is some controversy as to the exact amount of acreage that was in when the rains began to fall and was not harvested.

I think the 48 acres under the testimony has been reduced considerably, and the plaintiff's counsel in his argument now only claims that 40½ acres were lost; but it will be for you to determine, gentlemen of the jury, just how many acres were in potatoes there and unharvested at the time the rainfall came and were destroyed.

Now, that is the allegation of the complaint touching the duty of the defendant to keep the water off this drainage district, so that the plaintiff might harvest his potatoes.

The defendant denies all these allegations with respect to this matter, and puts in issue all the allegations except the fact that the contract was entered into for the leasing of this land. So that puts upon the plaintiff the burden of showing by a preponderance of the evidence, that he had been damaged, in accordance [203] with the allegations of this complaint. What we mean by a preponderance of the evidence is such an amount of evidence as would cause the scales to go down upon one side or the other. If the scales stand at balance, of course, there is no preponderance. If they go down for the plaintiff, then the plaintiff should recover, so far as the effect of the preponderance of the evidence is concerned.

Now, in the same connection, with respect to these allegations touching the refusal and neglect of the defendant to comply with the obligations of its contract, it is further alleged, in effect, that the plaintiff, for the purpose of harvesting the potatoes, had employed and there were ready for work upon the ground forty-six men, and that said men were paid at the rate of $40

each month and that their board cost so much, and so on, and that by reason of having provided these men on the premises for doing the work, and by reason of having to pay their board and lodging while there, and by reason of the fact that the defendant had so allowed the land to be flooded that the potatoes could not be harvested, the plaintiff claims that he is entitled to recover for the expenses of having provided these men and having to board them during the time that the plaintiff could not work the land in harvesting the potatoes, and he asks an additional sum or sums, to wit, the sum of $920, which is to be added to the sum of $345, making in the aggregate $1,265 that the plaintiff asks now under that first cause of action, in addition to whatever damages he is entitled to under the allegation to the effect that the defendant refused to comply with its part of the contract in keeping the water drained from the land so that the plaintiff might harvest his potatoes. That as to the first cause of action.

I should say in this connection that the defendant has denied these allegations touching this special damage, and that puts upon you the burden of determining whether or not the plaintiff has proven that cause for special damage.

The plaintiff, however, has a first further and separate cause of action, and that cause of action is alleged in effect as follows:

That subsequent to the delivery of the lease and prior to the first day of January, 1918, and within the time required by said lease agreement, plaintiff proceeded to the property described in tract 2 in said

lease—that relates to the [204] lands in the Beaver District, or the 3,000 acres—and selected from the Beaver Drainage District tract a certain 3,000 acres of land; "that by the terms of said lease defendant agreed to deliver possession of tract 2 described herein, to plaintiff at the time therein stated, and relying upon said representation and agreement of defendant, plaintiff employed laborers and purchased machinery and forwarded the same to said property for the purpose of preparing said tract 2 for farming." Then it is alleged that the defendant, "without right or cause, failed and refused, and still fails and refuses, to turn over and deliver to plaintiff possession of said tract 2, and plaintiff was required to return said laborers so employed, to their place of departure, and to reship said machinery so sent to said tract." And then it is alleged "that plaintiff expended and is damaged in the sum of $895 in sending such laborers and machinery to said tract 2 as aforesaid, and in returning them." This sets forth what the plaintiff claims as to this part of his complaint. The defendant denies these allegations, and that puts upon the plaintiff, as I have said to you before, the burden of establishing, to your satisfaction, by a preponderance of the evidence, the allegations of his complaint in this particular, on this further and separate complaint.

The plaintiff in his primary cause of action has alleged that the loss to the plaintiff was 120 sacks of potatoes to the acre, reasonably worth $1.50 per sack (that has been reduced by the testimony, and is a

question for you to determine), whereby plaintiff was damaged in the sum of $10,080.

Now, gentlemen of the jury, I will take care of this part of the controversy before I come to certain matters that have been set up by the defendant by way of setoff or counterclaim to these claims of the plaintiff.

The particular matters comprised by these issues are: First, did the defendant perform the duties on its part that it was required to perform under the lease for the purpose of the protection of the plaintiff in harvesting his potatoes? As I have said in your presence before, this Midland Drainage District has been set off and has been improved by the construction of canals and lateral ditches, and also by the construction of tide-gates for the purpose of letting out the water and preventing outside water from flowing inside, and the providing of pumps for the carrying off of the surplus water when the tide-gates would not act. It was the duty of [205] *It was the duty of* the defendant, without going into a discussion of the lease to show from what source that duty is derived, so to drain this land that it would be susceptible of cultivation, not only for the purpose of putting in crops of potatoes and other crops, but so to drain it that the land would be susceptible of allowing the potatoes to be harvested. I may indicate to you my views on the subject as to the extent to which this duty would go by saying to you that it was the purpose in draining these lands to put the lands in like condition as upland is in naturally, or ordinary level land that is drained by natural sources or by natural drainage ways, even aided by the hand of man in con-

structing other drainage for the purpose of keeping the land rid of the flood waters that may fall upon it during the rainy season, or during any time of the season, so as to enable the parties who are cultivating the land to cultivate it in a husband-like manner, or to cultivate it when the season is proper that the land should be cultivated and to reap when the season is proper that the product should be harvested. So that in looking over the duty and considering the duty of the defendant in this case, you will consider that it was its duty so to drain this land for the protection of those who might lease from the holders of the land in the district that the land would be in the same ordinary condition that upland would be in in its natural way, or that level lands or flat lands would be with the ordinary drainage that is provided by nature and such as provided by the hand of man for ridding the land of the surplus waters. So that people who are farming in this drainage district ought to be placed in the same condition that people are in who are farming upon uplands or the ordinary level lands, or even the flat lands, that are not drained by a special drainage construction like a district of this kind. Now, that gives you the idea of what the defendant was required to do for the protection of the plaintiff in this case in so operating those pumps as to keep the drainage canals open so that the water would naturally flow from this land into the sump and thereby be carried [206] away from the land. Under the contract itself it is made the duty of the defendant company to keep the main canal open so that it would carry the water off. It is made the duty of the

plaintiff in this case, or those using the land, to keep the lateral ditches open so that they will drain into the main canal. So that there is afforded a regular drainage system to take the water from the land through the lateral ditches into the main canal and then carry it off by the pumps.

Now, in further defense of this main cause of action the defendant alleged: "That the proximate cause of the damage, if any, to the plaintiff's potatoes grown upon said land, and the proximate cause of any damage sustained by plaintiff in connection with the planting, growing and harvesting of said potatoes was not the failure of the said defendant to perform its obligations to the plaintiff under the said lease contract or under the law, but was the negligent omission and failure of the said plaintiff to harvest said crop of potatoes in due course of husbandry and according to the custom of persons raising crops of potatoes in the vicinity of the said land; that said crop of potatoes had matured and was ready to be harvested and dug by the plaintiff several weeks before the same was damaged by rainfall or surface water or at all, and that during all of said times the said plaintiff, by the exercise of reasonable care and by following the custom of husbandry with respect to such crop," could and should have harvested said crop of potatoes before the rains of the year 1917.

That is one of the defenses that the defendant interposed to this main cause of action, alleging that the plaintiff failed to exercise the ordinary care that good husbandry requires for the gathering of his potatoes prior to early rainfall; and then it further

alleges, as a further defense to this main cause of action, that in addition thereto, "after the said rainy season set in, the rainfall was of such volume and the rainy days so frequent that no amount of pumping of water from said drainage district would have been removed a [207] sufficient amount of moisture from said land so as to render it practicable to dig said potatoes; but that, on the contrary, the condition of said land became and continued, until after plaintiff's potatoes had been injured, so soaked with water which would not drain off into said drains so it could be pumped by the pumps upon said land." That is the second defense to the plaintiff's main cause of action.

Now, gentlemen of the jury, I instruct you, as to the plaintiff's duty in this respect, that he was required to exercise the ordinary care with regard to planting his crops that good husbandry would require. And some of you, gentlemen of the jury, are agriculturalists yourselves, and probably know something about that. A farmer or a horticulturist ought to know the season of the year, he ought to know when it is time to plant certain products, and when it is time to reap, and you will have to determine in this case in the first instance whether or not the plaintiff exercised in planting his potatoes good husbandry, whether or not he planted them in seasonable time to have them ripen in seasonable time, and that you must find from the testimony in the case regarding the place where the crop was planted and the vicinity that surrounded it. Of course, a farmer or horticulturist is not required to plant early, nor is he de-

prived of the right to plant later, or late, but of course he must take his chances upon the time that is required for the crop to mature, and the season of the year when it will be ready to mature. A good husbandman will look to the future for ascertaining when his crops would likely be ready to mature, and whether or not the season at the time would be in condition so that he could gather the crops. Furthermore, a person must take into consideration the time when his crops are likely to mature; that is calculating from the time that he plants them; and then he is required to take knowledge and notice of the probably condition of the weather at that time, and whether or not, under ordinary circumstances, he would be able to gather those crops and to have them saved to his use and benefit.

Now, there has been much said here that these crops did not [208] ripen as early as they ought to have ripened, and that therefore the plaintiff was negligent in allowing his crops to mature so late as they did mature. Well, if the conditions of the weather were such that, if this land had been drained as uplands are ordinarily drained, the plaintiff could have harvested his crop and saved it, then, of course, the defendant would be liable in this case if it did not relieve the land of the water that was liable to accumulate, or did accumulate through the operation of the tide-gates and the pump. And that is about all there is in this case. If the plaintiff did not exercise good husbandry in getting his crops in in time, and in allowing them time to mature, and thereby allowed the time to mature to run so late in the season that he could not harvest

them by reason of the heavy rainfall, or the extraordinary rainfall, then he could not recover in this case. There are times when, by reason of rainfall in this country, a man can neither sow nor reap; he can neither plant his crops nor can he harvest them. And if these crops were lost through the usual or ordinary conditions of the rainfall in the fall of the year, so that the plaintiff could not harvest them prior to the time that they were so soaked that they were destroyed by the rain, then the plaintiff in this case could not recover. And comparing the duty of the defendant in this case to keep this land so drained that it would be susceptible of use in the digging of these potatoes as the uplands would be drained, then, if the defendant company had exercised its obligation and kept the water off this land as water would ordinarily be kept off upland, and if the plaintiff lost his potatoes by reason of the heavy rainfall, the defendant would not be liable, because the loss of the potatoes would be because of the negligence or the unskillful planting and digging of the potatoes.

"Defendant was under no obligation to furnish any other facilities for draining the rainfall from the land on which the potatoes were growing into the main drainage ditch, except the small drainage ditches which were upon the land at the time of the making of the lease and plaintiff's taking possession of the land. Under the lease it was the plaintiff's duty to keep such small ditches clear and open and defendant was under no obligation to provide other ditches on said land to drain such rainfall from the land into the main drainage ditch. If, therefore, the

loss of plaintiff's potatoes was because the said water could not drain from the said land into the main drainage ditch or canals in sufficient time to prevent the water standing on the [209] land and destroying said potatoes, then defendant is not liable for the loss of said potatoes."

In that connection I will say to you that it was the duty of the defendant to keep the large canals open so that the water would constantly flow to the sump, and the water out of the sump to such a lower depth that the drainage canal would operate to carry the water constantly to the sump, and thereby be enabled to carry off the water that might be drained into the canals by the lateral ditches.

"In determining whether the water could have been drained into the main drainage ditch in time to have saved the potatoes from loss, you have a right to consider the manner in which the potatoes were planted and had been hilled, the location of the small drainage ditches, the volume and frequency of the rainfall, and the height of the water in the main drainage ditch during the time of such rainfall and up to the time when said crop was destroyed by said water."

"The obligation of defendant to pump the water from the sump into which the drainage canal discharged the water was solely for the purpose of having the water in said main drainage canal at such a stage that the land would drain into said main drainage canal freely and not be prevented from draining therein because obstructed by the water standing in said main drainage canal."

Now, gentlement of the jury, as to the claim of plaintiff that he has a right to recover for the men who have been provided for digging these potatoes, and for the expense attending the keep of the men, if you find for the plaintiff upon this main cause of action, that the defendant was negligent and that the plaintiff is entitled to recover, then you will determine the amount of expenses the plaintiff has been at in providing these men and maintaining them during the time the plaintiff would have occupied them in digging these potatoes, if the ground was fit or ought to have been fit for digging the same. That is to say, gentlemen of the jury, the plaintiff cannot recover as to these expenses unless you find that the defendant was negligent, and by its negligence prevented the plaintiff from digging these potatoes at the time he had men there ready to dig them.

The measure of damages, gentlemen of the jury, if you find for the plaintiff on the main cause of action, will be the price of the potatoes. You will first find [210] what amount of potatoes were in the ground and the amount of acreage on which the potatoes had been planted, and therefrom you will determine, by the market value of the potatoes at that time, what the probable value of the entire crop would be, the same being in the ground. Then you will deduct from that the probably cost and expense of digging those potatoes, and when you have done that, the amount left will be the amount of damages sustained by the plaintiff by the negligence of the defendant. Then in addition to that you will find the expense for keeping the men there, for providing the men and keeping

them there for the purpose of digging those potatoes. That will be added to the difference which I have explained to you.

Then, gentlemen of the jury, as to the second cause of action you will determine in the first place whether the defendant did not comply with the terms of its contract in turning over to the plaintiff the 3,000 acres. There is evidence here that the plaintiff was with the defendant, and that they agreed that this land should be set off in 500 acre tracts, and that certain improvements should be made upon each 500-acre tract, and that this should be done so that the plaintiff might take posession of the lands and proceed to work them. The plaintiff says that the defendant failed to do any work or to put the land in condition so that he might take possession, and I think there is some evidence here to the effect that the defendant company never built any of those cantonments as they have been called, or did anything towards them except that it put certain materials upon one of the 500 acre tracts, and possibly constructed in part some of the buildings, and that because of that fact the plaintiff was unable to take possession; but that in anticipation of the defendant putting the tracts into shape so that the plaintiff might take posession of them the plaintiff had brought certain men upon the ground and had transported certain implements for the purpose of taking possession and of working these lands. Now the plaintiff claims damages for the expense he has been at in providing these men and in providing implements, and in boarding the men while they were there; and if you find now that the defend-

ant did not comply with its contract in putting the 3,000 acres in shape so that the plaintiff could take possession, then the plaintiff would be entitled to recover upon this count. Oherwise he would not.

The evidence in this case shows that by a mutual agreement between the parties [211] the contract was rescinded as to this 3,000 acre tract, but that makes no difference in this case. As the law reads, the plaintiff was entitled to be put in *statu quo;* that is, in the condition that he was in prior to entering into this contract; and in order to do that the plaintiff should be paid for the expense he was at. This, of course, as I have said, depends upon whether or not the defendant breached its contract by reason of not having the lands in condition for the plaintiff to take possession thereof.

Now, you will find in your verdict what the damages under this further and separate cause of action amount to, and then by adding the damages on the main contract, and the expenses, if any, that the plaintiff is entitled to recover of the defendant for providing men to dig these potatoes, and the damages sustained by reason of this second cause of action, you will ascertain what amount the plaintiff is entitled to recover from the defendant.

After you have done that, gentlemen of the jury, then there are two other matters to be considered.

The defendant has alleged, as setoff to any demand that the plaintiff might have against it, that the plaintiff rented 400 acres of land in tract 1 from the defendant, and that he agreed to pay $9 an acre for the 400 acres of land, which would be $3,600.00; that

there has been paid thereon the sum of $2,000.00, leaving due the defendant from the plaintiff the sum of $1,600. I instruct you as a matter of law that the defendant is entitled to recover $1,600.00 from the plaintiff in this case, and is entitled to have that set off against any amount that you might find is due the plaintiff from the defendant. That is one item.

And then the defendant has another further and separate cause of action or setoff, which is admitted to be just by the plaintiff, and that is a cause of action for an indebtedness which it is alleged accrued to the defendant "for work, labor, services performed and goods, wares and merchandise furnished, sold and delivered" to the plaintiff, and that item amounts to $1,558.40. That is admitted as being due from the plaintiff, to the defendant.

So that you have the two items now, the $1,600 and the $1,558.40. You will add those together, and it will give the amount that the plaintiff is required in any [212] event to account for to the defendant. And in order to adjust the verdict in the end, you will determine in the first place what amount the plaintiff is entitled to recover from the defendant, and if that amounts to more than these two items that the defendant is entitled to recover from the plaintiff, then you will give a verdict for the plaintiff for the difference. But if in your findings it appears that the plaintiff is not entitled to recover as much as the amount of these two items that the defendant is entitled to recover from the plaintiff, then you should give your verdict for the defendant for the difference between the two.

Now, gentlemen of the jury, you are the judges of the effect of the testimony. The Court gives you the law, and you will take that implicitly and apply it. But when it comes to determining what the testimony proves as to the facts, you have the sole burden in that respect.

In order to determine the credibility of witnesses, you have a right to take into consideration certain rules. For instance, a witness is presumed to speak the truth, but that presumption may be overcome by the manner in which he testifies and by the character of his testimony, or by testimony affecting his character or his motives, or by contradictory evidence. A person who has been found at fault in one particular in his testimony is to be distrusted in all. And so it is you may take into consideration the interest that a witness may have in the outcome of the proceedings or the cause of action which is being tried. Furthermore, you may take notice of the deportment of a witness upon the witness-stand. You may say from the way he gives his testimony whether he seems to be candid and open, and seemingly desirous of giving you the entire truth, or whether he is seemingly reserving something he does not want you to have; and in this way you may determine in the end what the credibility of each witness is as they have come before you, and then you will be able to determine in the end what your verdict shall be upon the entire testimony in the case. In determining this matter you should take into consideration all the testimony that has been given both for the plaintiff and for the defendant, and ascertain from a consideration of the whole in what

words you shall render your verdict in this case.

Are there any exceptions? [213]

Mr. RANKIN.—The only exception we wish to reserve is regarding the payment of rent.

Mr. SEWALL.—There are certain requests for instructions that were not given, We reserve exceptions to those.

COURT.—By the way, there were some instructions—I didn't give all of yours, but there was an instruction that was asked by the plaintiff that I intended to give. I didn't give all of yours, because I didn't think they were applicable. I have given three of them.

Mr. SEWALL.—I will just save an exception for the record.

COURT.—This, gentlemen of the jury, is rather out of its order, but you will see in a minute where it should be applied.

I further instruct you that if you find from the evidence that there were a number of Chinese laborers employed by the plaintiff in the harvesting of crops on the Midland District, and that the plaintiff paid those men so much per day, and also provided for their board, and if you further find from the evidence that these men were at the premises and ready to harvest the crop which was destroyed, but were prevented from doing so by reason of the failure of the defendant to drain the lands of the rainfall so that they could work and harvest the potatoes, you are then entitled to award to the plaintiff in this case the amount of money which plaintiff paid these men for wages and board during the time when they were pre-

vented from working by reason of the failure of the defendant to drain the lands, as above stated. The plaintiff in this regard claims damages in the amount of $1,265.00 and you are entitled to award any sum, not to exceed $1,265.00, which will compensate plaintiff for the moneys so expended, if you find they were so expended.

This, of course, as I have instructed you, depends upon whether you find for the plaintiff in the main cause of action.

And as to the market value: Market value is properly defined as the price that is willing to be paid by a man who does not have to buy, to a man who does not have to sell, but where there is no demand for a thing and no ability to sell the same, that article cannot have a market value. The law, in fixing damages for the destruction of personal property, allows the recovery of the market value of the [214] property destroyed, at the time and place of destruction (in this case Clatskanie, Oregon), and the market value therefore, would be that price which was paid at the point of shipment at Clatskanie, Oregon, less whatever you find to be the cost of harvesting the potatoes. [215]

After the Court had instructed the jury as above, plaintiff duly excepted to the following portion of said instructions, to wit:

> "The defendant has alleged, as a setoff to any demand that the plaintiff might have against it, that the plaintiff rented 400 acres of land in tract 1 from the defendant, and that he agreed to pay $9 an acre for the 400 acres of land, which

would be $3,600.00; that there has been paid thereon the sum of $2,000.00, leaving due the defendant from the plaintiff the sum of $1,600.00. I instruct you as a matter of law that the defendant is entitled to recover $1,600 from the plaintiff in this case, and is entitled to have that setoff against any amount that you might find is due the plaintiff from the defendant. That is one item."

Said plaintiff also excepted to the following portion of said instructions:

"So that you have the two items now, the $1,600.00 and the $1,558.40. You will add those together, and it will give the amount that the plaintiff is required in any event to account for to the defendant."

Said defendant duly excepted to the following portion of said instructions:

"It was the duty of the defendant, without going into a discussion of the lease to show from what source that duty is derived, so to drain this land that it would be susceptible of cultivation, not only for the purpose of putting in crops of potatoes and other crops, but so to drain it that the land would be susceptible of allowing the potatoes to be harvested. I may indicate to you my views on the subject as to the extent to which this duty would go by saying to you that it was the purpose in draining these lands to put the lands in like condition as upland is in naturally, or ordinary level land that is drained by natural sources or by natural drainage ways,

even aided by the hand of man in constructing other drainage for the purpose of keeping the land rid of the flood waters that may fall upon it during the rainy season, so as to enable the parties who are cultivating the [216] land to cultivate it in a husband-like manner, or to cultivate it when the season is proper that the land should be cultivated and to reap when the season is proper that the product should be harvested. So that in looking over the duty and considering the duty of the defendant in this case, you will consider that it was its duty so to drain this land for the protection of those who might lease from the holders of the land in the district that the land would be in the same ordinary condition that upland would be in its natural way, or that level lands or flat lands would be with the ordinary drainage that is provided by nature and such as provided by the hand of man for ridding the land of the surplus waters. So that people who are farming in this drainage district ought to be placed in the same condition that people are in who are farming upon uplands or the ordinary level lands, or even the flat lands, that are not drained by a special drainage construction like a district of this kind. Now, that gives you the idea of what the defendant was required to do for the protection of the plaintiff in this case in so operating those pumps as to keep the drainage canals open so that the water would naurally flow from this land into

the sump and thereby be carried away from the land."

EXHIBITS.

Plaintiff's Exhibits 1, 2, 3, 4 and 11 are the original exhibits received in evidence on the trial and are attached to and made a part of this bill of exceptions by stipulation of counsel; and it is further stipulated that said original exhibits shall be transmitted to the Clerk of the Circuit Court of Appeals by the Clerk of the District Court with a copy of this bill of exceptions certified, to the Circuit Court of Appeals, and that said original exhibits shall, without being printed as a part of the record, be inspected by the Court in deciding this case.

Plaintiff's Exhibits 5, 6 and 7 are wholly immaterial to any [217] question presented by the bill of exceptions herein.

Plaintiff's Exhibit 8 is as follows:

"#762 Sacramento Street,
San Francisco, California.
January 5, 1918.

Columbia Agricultural Co.,
Clatskanie, Columbia County,
Oregon.

Attention—Mr. R. B. Magruder.

Gentlemen:

In view of your failure to keep and perform the terms and conditions of the lease made and entered into by ourselves on the 2nd day of March, 1917, and by which you were required to build certain buildings

and to perform certain other work, none of which have been built or performed by you, I am compelled to notify you of my cancellation of such lease. I have heretofore verbally given you notice of such cancellation, which was agreed to by you, and I shall be obliged if you will consider this as a confirmation of the same, and write me a letter accordingly.

As I have previously advised you, by your failure to pump the water off of approximately from 45 to 50 acres of land covered by the lease, and on which I had planted potatoes, such crop was completely ruined so that I was unable to obtain any returns whatsoever from that portion, and have been damaged over the sum of Ten Thousand Dollars ($10,000.00). I shall be glad to submit figures in proof of this at any time you desire, and would request that you take this matter up at your early convenience.

The lease calls for Thirty Six Hundred Dollars ($3600.00) rental for the year 1917, at the rate of Nine Dollars ($9.00) per acre for 400 acres, but inasmuch as you only turned over to me not quite 200 acres, the rental should not exceed Eighteen Hundred Dollars ($1800.00). You now have in your possession, Two Thousand Dollars [218] ($2000.00) of my money, leaving a credit with you of Two Hundred Dollars ($200.00), which amount I shall be obliged if you will return to me.

Please be advised that this cancellation of the lease is not intended to cancel my right for damages against you, owing to your failure to keep the water

off of the land above referred, to and that such right for damages is hereby fully reserved.

Very truly yours,

C:T. SEID PAK SING."

Plaintiff's Exhibit No. 9. A copy of this exhibit is in this bill of exceptions at page 45.

Plaintiff's Exhibit No. 10.

WESTERN UNION TELEGRAM.

"Clatskanie, Wash.

Seid Pak Sing.

762 Sacramento St.,

San Francisco, Calif.

Directors meet next Friday your letter fifth will be submitted please write or wire fully explaining your proposal to rent smaller acreage in Beaver and your wishes regarding Midland Camp the tracts west of Midland Camp can be rented sixteen dollars per acre explain also your proposal made through Mr. Low to purchase part of Beaver so all can be fully understood and acted upon decisively, Friday.

R. B. MAGRUDER,

Plaintiff's Exhibit No. 11 is wholly immaterial to any question in the case.

Plaintiff's Exhibit No. 12. (See next page.)

[219]

Plaintiff's Exhibit No. 12.

Date.	Rainfall Inches.	Total Rainfall After 12′ Stage Portland.	Total Water Which Could Have Been Pumped (Inches).	Depth of Surplus Water on Land or in Soil (Inches).
1917.				
Nov.				
26	0			
27	.10			
28	.34			
29	.81			
30	.24			
	3.18			
Dec.				
1	.73			
2	.80			
3	.25			
4	.87			
5	.14			
6	.46			
7	0			
8	.02			
9	.20			
10	.13			
11	.62			
12	.55			
13	1.82			
14	1.24			
15	0.34			
16	.51			

Tide-gates work until Dec. 17, 1917.

Date.	Rainfall Inches.	Total Rainfall After 12′ Stage Portland.	Total Water Which Could Have Been Pumped (Inches).	Depth of Surplus Water on Land or in Soil (Inches).
17	1.98	1.98	.408	1.57
18	1.21	3.19	.816	2.37
19	.87	4.06	1.224	2.84
20	.02	4.08	1.632	2.45
21	.39	4.47	2.040	2.43
22	.65	5.12	2.448	2.67
23	.11	5.23	2.856	2.37
24	0	5.23	3.264	1.97
25	.14	5.37	3.672	1.70
26	.93	6.30	4.080	2.22
27	.85	7.15	4.488	2.66
28	1.19	8.34	4.896	3.44
29	.65	8.99	5.304	3.69
30	.34	9.33	5.712	3.62
31	1.09	10.42	6.120	4.30
	19.10			
1918.				
Jan.				
1	.04	10.46	6.528	3.93
2	0	10.46	6.936	3.52
3	.89	11.35	7.344	4.01
4	.11	11.46	7.752	3.71
5	.06	11.52	8.160	3.36
6	.21	11.73	8.568	3.16
7	.59	12.32	8.976	3.34
8	.10	12.42	9.384	3.04
9	0	12.42	9.792	2.63
10	0	12.42	10.200	2.22

Date.	Rainfall Inches.	Total Rainfall After 12' Stage Portland.	Total Water Which Could Have Been Pumped (Inches).	Depth of Surplus Water on Land or in Soil (Inches).
11	.61	13.03	10.608	2.42
12	.36	13.39	11.016	2.37
13	.28	13.67	11.424	2.25
14	.94	14.61	11.832	2.78
15	.70	15.31	12.240	3.07
16	.48	15.79	12.648	3.14
17	.24	16.03	13.056	2.97
[220]				
1918.				
Jan.				
18	.71	16.74	13.464	3.28
19	0	16.74	13.872	2.87
20	0	16.74	14.280	2.46
21	.08	16.82	14.688	2.13
22	.04	16.86	15.096	1.76
23	0	16.86	15.504	1.36

Tide-gate begins to work [221]

DEFENDANT'S EXHIBITS.

Defendant's Exhibit "A."

"SING KEE COMPANY.

Copy of Telegram.

San Francisco, Cal., Nov. 17, 1917.

Mr. R. B. Magruder, Mgr.
Columbia Agriculture Co.,
Clatskanie, Ore.

Dear Sir:

When I send you my letter dated Nov. 13, I was promised by various parties to take up the whole 3,000 acres. Some of them have back out. I now

judge that I can only be able to cultivate about 1500 hundred acres coming year. Will you please immediately call a directors meeting to sanction me to cultivate 1500 hundred acres coming year. I am now exerting my utmost effort to get more parties to farm balance.

I will have about one hundred fifty persons coming up to the ranch soon, please reserve the houses as requested.

Please telegraph me the decision of your directors meeting immediately. Please write me as soon as possible about the size of machines.

Very truly yours,

SING KEE & CO.

By "————.

Defendant's Exhibit "B" is the Annual Meteorological Summary of the United States Department of Agriculture Weather Bureau for the year 1917, and the portion of said exhibit offered in evidence was the portion showing the river readings giving the stage of water in the Willamette River at Portland, Oregon, each day during the months of September and October and November and December, 1917, said readings showing the stage of water in feet and fractions thereof above the zero mark. [222]

Defendant's Exhibit "B."

"RIVER READINGS.

Stage of Water in the Willamette River Each Day During the Months of September, October, November and December, 1917.

Day.	September.	October.	November.	December.
1	5.8	4.3	3.2	5.1
2	6.0	3.8	2.0	5.5
3	5.9	3.6	2.1	5.1
4	5.1	2.9	1.5	4.2
5	4.5	2.4	1.3	3.3
6	4.2	2.0	1.5	2.9
7	4.0	1.8	1.0	2.4
8	3.8	1.6	1.1	1.9
9	3.6	1.5	1.4	1.8
10	3.5	1.9	1.5	2.0
11	3.5	2.0	1.7	2.1
12	3.6	2.2	1.9	2.8
13	3.8	2.6	2.7	4.7
14	3.7	2.9	2.6	7.4
15	3.9	3.3	3.1	9.4
16	4.1	3.7	2.5	9.5
17	4.2	3.5	2.0	9.9
18	3.9	3.0	1.4	12.6
19	3.7	2.2	1.0	17.2
20	3.0	1.9	0.5	19.7
21	2.5	1.6	0.5	19.3
22	2.1	1.5	0.4	18.8
23	1.9	1.5	0.5	17.8
24	1.9	1.4	0.9	15.8

Day.	September.	October.	November.	December.
25	1.9	1.5	1.3	14.3
26	2.1	1.9	1.5	13.9
27	2.8	2.2	2.2	15.1
28	3.0	2.3	3.5	16.1
29	3.8	2.5	3.8	17.8
30	3.7	3.2	4.8	18.6
31		3.5		19.3
Means	3.6	2.5	1.8	10.2"

Defendant's Exhibit "C," "D," and "E" are the Government records of the rainfall at Doraville, Oregon, during the months of October, November and December, 1917, which records are summarized at page 97 of this bill of exceptions.

Defendant's Exhibit "F" is already in the record at page 100 of the bill of exceptions.

Defendant's Exhibit "G" is a deed from the defendant to R. B. Magruder of all of the diked land in the Midland District, dated December 21, 1912, duly acknowledged and recorded in Deed Records of Columbia [223] County, Oregon, in Book 18 at page 205. Said deed contains the following provisions and covenants:

"Excepting nevertheless, and subject to the reservations, restrictions and conditions hereinafter set forth and mentioned:

TO HAVE AND TO HOLD the same unto the said party of the second part, his heirs and assigns, forever; but subject, nevertheless, to the following reservations, restrictions and conditions, to wit:

WHEREAS, said grantor has completed the construction of the necessary levees, ditches and drainage system, and reclaimed said lands and rendered the same fit for cultivation.

WHEREAS, it is necessary for the proper cultivation of all of said lands to keep and maintain the said levees and keep, maintain and operate the ditches and drainage system now constructed upon the same, and prorate the expense thereof among the several property owners, in proportion to the number of acres owned by them therein; and

WHEREAS, said party of the second part, for himself, his heirs, successors, assigns and legal representatives, has agreed to sell all of said lands to be protected as aforesaid; upon the express covenant and condition that purchasers of the same will associate themselves together and form an association with the other property owners therein, to be known as Midland Drainage District, and bear their said proportionate expense of carrying on and maintaining said levees and drainage system, and be governed by three Trustees, as hereinafter mentioned.

NOW, THEREFORE, in consideration of the premises and as part consideration of this sale and in consideration of the covenants and agreements herein contained to be considered as covenants and conditions running with, attaching to and becoming a perpetual burden upon the said lands hereinabove described and granted to said party of the second part, his heirs, successor or successors, legal representatives or assigns, which shall remain in force and

be binding upon said second party hereto, and upon his heirs, personal representatives [224] and assigns; The party of the first part hereby expressly reserve from the land above-described, for itself, its successor or successors and assigns, all of the main drainage canals, district roads, boat landings and also a perpetual right, privilege and easement, for the benefit, however, of all the property owners in said district, to go upon, maintain and keep in repair the levees and the private roads situate thereon, where now constructed over, across and upon said lands, and for such purposes to go upon, over and across said lands; that all the roads on the levees are private district roads and shall be free for the use of all owners of land included within the district, and can only be obstructed by gates, or otherwise, on written consent from the trustees;

A general meeting of all the land owners or holders of contracts for the purchase of property above-described and to be included within Midland Drainage District, shall be held on or before February 1, 1913, at Clatskanie, Columbia County, Oregon, at which meeting there shall be elected a Board of Trustees, consisting of three property owners or contract holders who shall hold their respective offices until the next regular annual election as may be prescribed by the by-laws for the government of said drainage district, and until their successors are elected and qualfied at which meeting there shall be adopted rules, regulations and by-laws for the government and regulation of the levees, roads, ditches and drainage system, by a majority of the owners in acreage of

all the lands within said drainage district, also providing for the assessments against each property owner within the district in proporton to the number of acres owner by him, for the necessary, expenses of maintaining and carrying on the same, providing that the same shall, when assessed, become a lien upon the land owned by said property owner; also providing that said Trustees shall have full power and authority to make and enter into contracts, and do and perform all the work necessary to operate and maintain said levees, roads, ditches and drainage system, in accordance [225] with said by-laws to be adopted at such meeting of the property owners. Each owner or contract holder in said district may cast as many votes for such Trustees to be elected and for the adoption of said by-laws as he has acreage within the district, provided that at no election shall his aggregate vote for Trustees exceed his acreage multiplied by the number of Trustees to be elected at such election. The party of the first part will as soon as the said Trustees are elected and qualified turn over and deliver unto said Trustees, for and on behalf of all the land owners in said district, the pumping-plant, tide-gates and equipment for same (which is hereby reserved and excepted in this conveyance for such purposes) and also turn over and deliver to said Trustees all its right, title and interest in and to the main ditches and easements which it has also hereby reserved from the land hereby sold.

The said party of the second part, for himself and his executors, administrators, heirs and assigns, in consideration of the premises herein mentioned, ex-

pressly covenants and agrees as follows: That he will, on or before thirty (30) days after demand therefor by the said Trustees or a majority of them or their successors, and as may be more fully set forth in the proposed by-laws pay any and all assessments which may be made against said land or any part or parcel thereof, from time to time, on account of the necessary expenses of carrying on the work of maintaining and operating the levees and drainage system above mentioned, and does hereby consent that the same may become a lien upon his land for the amount of such assessment, which lien may be foreclosed as mortgages are foreclosed under the laws of Oregon relating thereto;

That at all times he will abide by and strictly keep and perform all of the rules, regulations and by-laws which may be adopted, by the property owners, as aforesaid, for the government and regulation of the levees, roads, ditches and drainage system, or which may be amended from time to time, by a majority of the owners of the acreage [226] in said districts as aforesaid;

That he will never use or occupy, or permit said land above described or any part of the same, to be used or occupied for the manufacture or sale of vinous, malt, spirituous or intoxicating liquors, of any kind or for any illegal purpose whatsoever;

That he will, in case of fire on the land included within the levees of the said Midland Drainage District, or in case of danger from high water or other cause, to any of the levees or other reclamation works, on or surrounding the land herein described, cause all

of his male employees on said land, when required by the Trustees of the district to assist in protecting and repairing the said levees and reclamation works under the direction of the Trustees, and continue such assistance so long as the danger, in the judgment of the Trustees, may continue, and to charge no more for such services than the rate then being paid such employees for the services for which they are ordinarily engaged; it being understood, however, that no charge shall be made by any land owner in said district for labor done in extinguishing fires on the particular land owned or held by him under contract;

That he will, to the satisfaction of the Trustees, at all times, keep open and clean, any and all permanent ditches upon said land now constructed for the purpose of irrigation or drainage, except main canals which shall be cared for by the Trustees to be appointed as aforesaid, at the expense of the district, and will keep the banks of all irrigation and drainage ditches that may lie within or along the boundaries of the land described in this agreement, free of all weeds and foul growth; also the premises around the building or buildings which are now or may hereafter be constructed on the within described land shall be kept clean of all rubbish and in good condition, of which the Trustees shall be the Judge;

That he will not plant any crops or shrubbery on the levees bounding the land herein described or erect any building, buildings, or docks thereon, or make any use of the same other than raising clean grass [227] or hay thereon, without the approval of the Trustees first had in writing which approval shall set

forth the kind of crops or shrubbery that may be planted or the buildings or docks constructed or the use made;

That he agrees that whenever, at any future time, it may become necessary to raise the height of the levees or deepen the channel, in accordance with certain contract of January 5, 1909, made with the United States, that the excavated material may be placed upon the levees, and said party of the first part hereby reserves such right and privilege for and on behalf of said Drainage District;

That he will keep and perform all the foregoing agreements, covenants and conditions on his part to be kept and performed, and does hereby accept this conveyance subject to all of the said terms and conditions herein contained."

Defendant's Exhibit "H" is a deed from R. B. Magruder to the defendant, reconveying the same property described in Exhibit "G," dated December 23, 1912, duly acknowledged and recorded in Deed Records of Columbia County, Oregon, in Book 18, page 209. This deed contains the same provisions and covenants as are contained in Exhibit "G."

Defendant's Exhibit "I" is a deed from defendant to the Trustees of the Midland Drainage District of Columbia County, Oregon, which deed contains the following provisions:

"1. The right, privilege and easement to go upon and maintain and keep in repair the levees and the private roads situated thereon, as the same are shown and designated upon the plat or map of said Midland Drainage District;

2. All of the main district drainage canals, district roads and boat landings, and the real property included within the boundaries of the same as more particularly shown and designated upon the said plat or map of Midland Drainage District, with the [228] right, privilege and easement to go upon the lands adjacent to the same for the purpose of maintaining and keeping the same in repair;

3. Also the pump house and tide gate and the land situated thereunder and around the same on Lot Eighty-one (81) of said Midland Drainage District as designated upon said map of Midland Drainage District;

4. Also all of the following described personal property now being located in the Pump house on the said Drainage district in Columbia County, State of Oregon, to wit:

1—75 HP. Samson Station Gas Engine No. 4885.
1—16 " Double Suction Samson Cent. Pump.

Together with accessories as the same are now installed in said Midland Drainage District Pump house.

1— 6" Monkey wrench.
1—21" Monkey wrench (Coes).
1—10" Stillson wrench.
1—24" " "
1—1½# Hammer.
1—14" Round file.
1—16" Half round smooth file.
1—Belt punch.
2—Oilers, Pint, Quart.
2—Pair Pliers.

1—16″ Screw driver.
1— 6″ Cold chisel.
3—Open end wrenches.

TO HAVE AND TO HOLD the same, together with all the tenements, hereditaments and appurtenances thereunto belonging unto the said Trustees, their successors and assigns forever, for the use and benefit, however, of all of the property owners in said Midland Drainage District; subject, however, to the following: those certain restrictions, reservations and conditions contained in said deed from the Columbia Agricultural Co., to R. B. Magruder, and as also expressed in a certain contract executed by said company to each and all of the property owners within said district, and as set forth in the deed of dedication and plat of said Midland Drainage District, and to be held in accordance with the By-Laws of said Midland Drainage district as the same were duly adopted at the first annual meeting of all of the property owners within said district, held at Clatskanie, Oregon, on January 25th, 1913.'' [229]

In the District Court of the United States for the District of Oregon.

SEID PAK SING,

Plaintiff,

vs.

COLUMBIA AGRICULTURAL CO., a Corporation,

Defendant.

Stipulation in Re Settlement of Bill of Exceptions.

It is hereby stipulated between the parties to the above-entitled action that the foregoing matter, consisting of 165 typewritten pages and the annexed original Plaintiff's Exhibits 1, 2, 3, 4 and 11, constitute the substance of all the evidence received, motions, objections and requests made and exceptions taken, and all the proceedings had upon the trial of the above-entitled action which in any manner relate to the liability of defendant upon the first and second causes of action set forth in the amended complaint herein, and also the substance of all the evidence received, motions, objections and requests made and exceptions taken which in any manner relate to the liability of plaintiff to defendant upon the second counterclaim for $1,600.00 rent set forth in the defendant's answer herein; that no other evidence was received upon the trial of said action which in any manner relates to any of said questions of liability.

It is further stipulated that said matter may be settled and allowed by the Court as a joint bill of exceptions herein to be used by both plaintiff and defendant upon the writs of error to be sued out by plaintiff and defendant respectively. [230]

It is further stipulated that said joint bill of exceptions was served and presented to the Court for settlement within the time as allowed by the orders of the

Court heretofore made herein.

STERLING CARR,
ROBERT R. RANKIN,
Attorneys for Plaintiff.
RUSSELL E. SEWALL,
GUY C. H. CORLISS,
Attorneys for Defendant. [231]

In the District Court of the United States for the District of Oregon.

SEID PAK SING,

Plaintiff,

vs.

COLUMBIA AGRICULTURAL CO., a Corporation,

Defendant.

Order in Re Settlement of Bill of Exceptions.

The annexed and foregoing matter consisting of 165 typewritten pages and the annexed original Plaintiff's Exhibits 1, 2, 3, 4 and 11, was duly presented to the Court for settlement within the time for settlement thereof, as fixed by the order of the Court based upon the stipulations of the parties; and it being stipulated between the parties hereto that said matter and exhibits may be settled as and for the joint bill of exceptions of the respective parties to this action, and said bill of exceptions being in conformity with the truth the said foregoing matter is hereby allowed and signed as and for the joint bill of exceptions of the respective parties to this action this 16th day of

February, 1920, and the same is hereby made a part of the record herein.

Said bill of exceptions contains the substance of all the evidence received, motions, objections and requests made and exceptions taken, and all the proceedings had upon the trial of the above-entitled action which in any manner relate to the liability of defendant to plaintiff [232] upon the first and second causes of action set forth in the amended complaint herein, and also the substance of all the evidence received, motions, objections and requests made and exceptions taken which in any manner relate to the liability of plaintiff to defendant upon the second counterclaim for $1,600.00 rent set forth in the defendant's answer herein, and any other evidence received upon the trial of said action which in any manner relates to any of said questions of liability.

Dated this 16th day of February, 1920.

CHARLES E. WOLVERTON,
District Judge.

Filed February 19, 1920. G. H. Marsh, Clerk. [233]

AND AFTERWARDS, to wit, on the 19th day of February, 1920, there was duly filed in said court a petition of Columbia Agricultural Company for writ of error, in words and figures as follows, to wit: [234]

In the District Court of the United States for the District of Oregon.

SEID PAK SING,

Plaintiff,

vs.

COLUMBIA AGRICULTURAL CO., a Corporation,

Defendant.

Petition of Columbia Agricultural Company for Writ of Error.

The Columbia Agricultural Co., a corporation, defendant in the above-entitled cause, feeling itself aggrieved by the verdict of the jury and the judgment in the above-entitled action, entered on the 21st day of October, 1919, by which it was adjudged that said plaintiff take judgment against this defendant in the sum of Two Thousand Twenty-four and 93/100 Dollars ($2,024.93), and costs, comes now by its attorneys, Russell E. Sewall and Guy C. H. Corliss, and petitions the said court for an order allowing said defendant to prosecute a writ of error to the Honorable the United States Circuit Court of Appeals for the 9th Circuit, under and according to the laws of the United States on that behalf made and provided; and also that an order be made fixing the amount of security which the defendant shall give and furnish upon said writ of error, and that upon the giving of said security all further proceedings in this court be suspended and stayed until the determination of said

writ of error, and your petitioner will ever pray.

RUSSELL E. SEWALL,
GUY C. H. CORLISS,
Attorneys for Defendant.

Filed February 19, 1920. G. H. Marsh, Clerk. [235]

AND AFTERWARDS, to wit, on the 19th day of February, 1919, there was duly filed in said court an Assignment of Errors, upon the petition of the Columbia Agricultural Company for writ of error, in words and figures as follows, to wit: [236]

In the District Court of the United States for the District of Oregon.

SEID PAK SING,

Plaintiff,

vs.

COLUMBIA AGRICULTURAL CO., a Corporation,

Defendant.

Assignments of Error of Columbia Agricultural Company.

Now comes the defendant above named and in connection with its petition for a writ of error in the above-entitled action, suggests that there was error on the part of the District Court of the United States for the District of Oregon in regard to the matters and things hereinafter set forth, and defendant makes this its assignments of error.

I.

The Court erred in refusing to instruct the jury as follows upon the request of the defendant after all the evidence had been received and both parties had rested:

"The jury are instructed that the plaintiff is not entitled to recover anything on account of the first cause of action set forth in the complaint herein, being the cause of action for damage to plaintiff's potato crop."

II.

The Court erred in refusing to instruct the jury upon the request of the defendant after all the evidence had been received and both parties had rested, as follows:

"The jury are instructed that the plaintiff is not entitled to recover anything on account of the second cause of action set forth in the complaint herein, being the cause of action for alleged damages on account of the expenses on account of certain men claimed to have been sent from California to Oregon to work on [237] the Beaver Drainage District."

III.

The Court erred in instructing the jury as follows, which instruction was duly excepted to by the defendant:

"It was the duty of the defendant, without going into a discussion of the lease, to show from what source that duty is derived, so to drain this land that it would be susceptible of cultivation, not only for the purpose of putting in crops of

potatoes and other crops, but so to drain it that the land would be susceptible of allowing the potatoes to be harvested. I may indicate to you my views on the subject as to the extent to which this duty would go by saying to you that it was the purpose in draining these lands to put the lands in like condition as upland is in naturally, or ordinary level land that is drained by natural sources or by natural drainage ways, even aided by the hand of man in constructing other drainage for the purpose of keeping the land rid of the flood waters that may fall upon it during the rainy season, so as to enable the parties who are cultivating the land to cultivate it in a husband-like manner, or to cultivate it when the season is proper that the land should be cultivated and to reap when the season is proper that the product should be harvested. So that in looking over the duty and considering the duty of the defendant in this case, you will consider that it was its duty so to drain this land for the protection of those who might lease from the holders of the land in the district that the land would be in the same ordinary condition that upland would be in its natural way, or that level lands or flat lands would be with the ordinary drainage that is provided by nature and such as provided by the hand of man for ridding the land of the surplus waters. So that people who are farming in this drainage district ought to be placed in the same condition that people are in who are farming upon uplands or the ordinary

level lands, or even the flat lands, that are not drained by a special drainage construction like a district of this kind. Now, that gives you the idea of what the defendant was required to do for the protection of the plaintiff in this case in so operating those pumps [238] as to keep the drainage canals open so that the water would naturally flow from this land into the sump and thereby be carried away from the land."

Dated February 19th, 1920.

RUSSELL E. SEWALL,
GUY C. H. CORLISS,
Attorneys for Defendant.

Filed February 19, 1920. G. H. Marsh, Clerk. [239]

AND AFTERWARDS, to wit, on Friday, the 20th day of February, 1920, the same being the 92d judicial day of the regular November term of said court—Present, the Honorable ROBERT S. BEAN, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [240]

In the District Court of the United States for the District of Oregon.

No. 7997.

SEID PAK SING,

Plaintiff,

vs.

COLUMBIA AGRICULTURAL CO., a Corporation,

Defendant.

Order Allowing Writ of Error and Fixing Amount of Supersedeas Bond — Columbia Agricultural Company.

On this 20th day of February, 1920, came the above-named defendant, by Russell E. Sewell and Guy C. H. Corliss, its attorneys, and filed herein and presented to the Court its petition praying for the allowance of a writ of error, intended to be urged by the defendant, praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered on the 21st day of October, 1919, duly authenticated may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and such other and further proceedings may be had as may appear proper in the premises.

On consideration whereof, the Court does hereby allow the said writ of error and that citation issue as by law provided.

It is further ordered that the amount of the supersedeas bond to be given by said defendant be and the same is hereby fixed at the sum of Three Thousand Dollars, with good and sufficient surety to be approved by this Court, and upon the approval of such bond it is ordered that execution upon said judgment be stayed.

Dated February 20th, 1920.

R. S. BEAN,
District Judge.

Filed February 20, 1920. G. H. Marsh, Clerk. [241]

AND AFTERWARDS, to wit, on the 20th day of February, 1920, there was duly filed in said court undertaking on writ of error on petition of Columbia Agricultural Company, in words and figures as follows, to wit: [242]

In the District Court of the State of Oregon for the District of Oregon.

7997.

SEID PAK SING,

Plaintiff,

vs.

COLUMBIA AGRICULTURAL CO., a Corporation,

Defendant.

Undertaking on Writ of Error on Petition of Columbia Agricultural Company.

UNDERTAKING ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS: That we, the Columbia Agricultural Co., a corporation of the State of Oregon, as principal, and E. S. Collins and P. J. Brix, both of 347 Pittock Block, Portland, Oregon, as sureties, are held firmly bound unto Seid Pak Sing, in the sum of Three Thousand Dollars, to be paid to the said Seid Pak Sing, for the payment of which, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 19th day of February, 1920.

Whereas, the above-named Columbia Agricultural Co. has applied for and obtained a writ of error to

the United States Circuit Court of Appeals for the Ninth Judicial Circuit, to reverse the judgment rendered in the above-entitled cause by the District Court of the United States for the District of Oregon.

Now, therefore, the condition of this obligation is such that if the said Columbia Agricultural Co. shall prosecute said writ to effect, and answer all damages and costs if it shall fail to make good its plea, then this obligation shall be void; otherwise [243] the same shall and remain in full force and virtue.

COLUMBIA AGRICULTURAL CO.,
By RUSSELL E. SEWALL,
By GUY C. H. CORLISS,
Attorneys in Law and in Fact.
E. S. COLLINS. (Seal)
P. J. BRIX. (Seal)

The within bond is hereby approved this 20th day of February, 1920.

R. S. BEAN,
Judge.

State of Oregon.
County of Multnomah,—ss.

Due service of the within bond and the receipt of a copy thereof duly prepared and certified by Guy C. H. Corliss, one of the attorneys for defendant, is hereby admitted at the city of Portland, in said county and State, this 20th day of February, 1920, and it is stipulated that said bond may be approved by the Court.

ROBERT R. RANKIN,
Of Attorneys for Plaintiff.

Filed February 20, 1920. G. H. Marsh, Clerk. [244]

AND AFTERWARDS, to wit, on the 25th day of February, 1920, there was duly filed in said court a petition of Seid Pak Sing for writ of error, in words and figures as follows, to wit: [245]

In the District Court of the United States for the District of Oregon.

SEID PAK SING,

Plaintiff,

vs.

COLUMBIA AGRICULTURAL COMPANY, a Corporation,

Defendant.

Petition of Seid Pak Sing for Writ of Error.

Comes now Seid Pak Sing, plaintiff above named, and feeling himself agrieved by the ruling, instruction, verdict and judgment in the above-entitled action entered on the 21st day of Oceober, 1919, by which it was adjudged that the above-named defendant have and secure of and from plaintiff herein, as alleged rent for said land, which was to be deducted from any verdict which might be found in favor of plaintiff, the sum of $1,600.00;

NOW, THEREFORE, plaintiff appearing by his attorneys of record, Sterling Carr and Robert R. Rankin, petitions the said Court for an order allowing said plaintiff to prosecute a writ of error to the Honorable, The United States Circuit Court of Ap-

peals for the Ninth Circuit, under and in accordance with the laws of the United States in such case made and provided; and also that an order be made fixing the amount of bond covering costs on appeal, which said plaintiff shall provide upon prosecution of said writ of error, and so your petitioner will ever pray.

STERLING CARR,
ROBERT R. RANKIN,
Attorneys for Plaintiff.

Filed February 25, 1920. G. H. Marsh, Clerk. [246]

AND AFTERWARDS, to wit, on the 25th day of February, 1920, there was duly filed in said court an assignment of errors on the petition of Seid Pak Sing for writ of error, in words and figures as follows, to wit: [247]

In the District Court of the United States for the District of Oregon.

SEID PAK SING,

Plaintiff,

vs.

COLUMBIA AGRICULTURAL COMPANY, a Corporation,

Defendant.

Assignments of Error of Seid Pak Sing.

Comes now the plaintiff above named and in defense of his petition for a writ of error in the above-entitled action, alleges that there was error on the part of the District Court of the United States for

the District of Oregon, in regard to matters and things hereinafter set forth, and assigns the hereinafter action as error in the trial herein:

I.

The Court erred in instructing the jury as follows, ater the evidence had been received and both parties had rested:

> "The defendant has alleged, as a setoff, to any demand that the plaintiff might have against it, that the plaintiff rented 400 acres of land in Tract 1 from the defendant, and that he agreed to pay $9 an acre for the 400 acres of land, which would be $3,600.00; that there has been paid thereon the sum of $2,000.00, leaving due the defendant from the plaintiff the sum of $1,600. I instruct you as a matter of law that the defendant is entitled to recover $1,600.00 from the plaintiff in this case, and is entitled to have that set off against any amount that you might find is due the plaintiff from the defendant."

II.

And that the second assignment of error may be made clear, the plaintiff advises this Honorable Court that the Trial Court instructed the jury as follows:

> "And then the defendant has another further and separate cause of action or setoff, which is admitted to be just by the plaintiff, and that is a cause of action for an indebtedness which it is alleged accrued to the defendant 'for work, labor, services performed and goods, wares, and merchandise furnished, sold, and delivered' to

the plaintiff, and that item amounts to $1,558.40. That is admitted as being due from the plaintiff to the defendant."

And that the said trial Court erred in instructing [248] the jury as follows; after all the evidence had been received and both parties had rested:

"So that you have two items now, the $1,600.00 and the $1,558.40. You will add those together, and it will give the amount that the plaintiff is required in any event to account for to the defendant. And in order to adjust the verdict in the end, you will determine in the first place what amount the plaintiff is entitled to recover from the defendant, and if that amounts to more than these two items that the defendant is entitled to recover from the plaintiff, then you will give a verdict for the plaintiff for the difference. But if in your findings it appears that the plaintiff is not entitled to recover as much as the amount of these two items that the defendant is entitled to recover from the plaintiff, then you should give your verdict for the defendant for the difference between the two."

Dated at Portland, Oregon, this 24th day of February, 1920.

STERLING CARR,
ROBERT R. RANKIN,
Attorneys for Plaintiff.

Filed February 25, 1920. G. H. Marsh, Clerk. [249]

AND AFTERWARDS, to wit, on Wednesday, the 25th day of February, 1920, the same being the 96th judicial day of the regular November term of said Court—Present, the Honorable ROBERT S. BEAN, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [250]

In the District Court of the United States for the District of Oregon.

No. 7997.

SEID PAK SING

vs.

COLUMBIA AGRICULTURAL COMPANY, a Corporation.

Order Allowing Writ of Error and Fixing Amount of Cost Bond—Seid Pak Sing.

On this 25th day of February, 1920, plaintiff above named appearing by Sterling Carr and Robert R. Rankin, his attorneys of record, having filed and presented to the Court its petition praying for the allowance of a writ of error intended to be urged by the plaintiff, and joining with defendant in and praying that transcript of the record and proceedings, and papers upon which the judgment herein was rendered on the 21st day of October, 1919, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit, with such other and further proceedings as may be proper in the premises;

NOW, THEREFORE, it is hereby CONSIDERED AND ORDERED that the Court does hereby allow the said petition for writ of error, and that writ and citation issue as provided by law; and

It is further CONSIDERED AND ORDERED that the amount of cost bond be given by said defendant in the sum of $500.00, with good and sufficient surety to be approved by this Court.

Dated this 25 day of February, 1920.

R. S. BEAN,
Judge of the Above-entitled Court.

Filed February 25, 1920. G. H. Marsh, Clerk. [251]

AND AFTERWARDS, to wit, on the 25th day of February, 1920, there was duly filed in said court an undertaking on writ of error on petition of Seid Pak Sing, in words and figures as follows, to wit: [252]

In the District Court of the United States for the District of Oregon.

SEID PAK SING,

Plaintiff,

vs.

COLUMBIA AGRICULTURAL COMPANY, a Corporation,

Defendant.

Undertaking on Writ of Error on Petition of Seid Pak Sing.

UNDERTAKING ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS, That we, Seid Pak Sing, as principal, and the National Surety Company, a corporation, as surety, are held and firmly bound unto the Columbia Agricultural Company, a corporation, in the sum of $500.00, to be paid to the said Columbia Agricultural Company, for the payment of which, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seal and dated this 25th day of February, 1920.

WHEREAS, the above-named Seid Pak Sing has applied for and obtained a writ of error to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, to reverse the ruling of the Court and judgment entered thereon by the District Court of the United States for the District of Oregon;

NOW, THEREFORE, the condition of this obligation is such that if the said Columbia Agricultural Company shall prosecute said writ to effect and answer all damages and costs, and if it shall fail to make good its plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

SEID PAK SING.
By STERLING CARR,
By ROBERT R. RANKIN,
Attorneys in Law and in Fact.

NATIONAL SURETY COMPANY, a Corporation,

[Seal] By E. P. WELCH,
Attorney in Fact.

Countersigned at Portland, Oregon, this 25th day of February, 1920.

NATIONAL SURETY COMPANY.
By E. P. WELCH,
Resident Agent.

The within bond is hereby approved this 25th day of February, 1920.

R. S. BEAN.

Filed February 25, 1920. G. H. Marsh, Clerk. [253]

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
District of Oregon,—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, pursuant to the foregoing Writs of Error and in obedience thereto, do hereby certify that the foregoing pages, numbered from 8 to 253, inclusive, contain a true and complete transcript of the record and proceedings had in said court together with the bill of exceptions filed therein, in the case in which the Columbia Agricultural Company, a corporation, is plaintiff in error and Seid Pak Sing is defendant in error in the writ of error issued upon the petition of the said Columbia Agricultural Company, and Seid Pak Sing is

plaintiff in error and the Columbia Agricultural Company, a corporation, is defendant in error in the writ of error issued upon the petition of the said Seid Pak Sing, as the same appear of record and on file at my office and in my custody.

And I further certify that the cost of the foregoing transcript of record is seventy-one 50/100 dollars and that the same has been paid by said plaintiff in error, Columbia Agricultural Company.

In testimony whereof I have hereunto set my hand and affixed the seal of the said Court, at Portland, in said District, this 19th day of March, 1920.

[Seal] G. H. MARSH,
Clerk. [254]

[Endorsed]: No. 3469. United States Circuit Court of Appeals for the Ninth Circuit. Columbia Agricultural Company, a Corporation, Plaintiff in Error, vs. Seid Pak Sing, Defendant in Error, and Seid Pak Sing, Plaintiff in Error, vs. Columbia Agricultural Company, a Corporation, Defendant in Error. Transcript of Record. Upon Writs of Error to the United States District Court of the District of Oregon.

Filed March 25, 1920.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the District Court of the United States for the District of Oregon.

No. 7997.

March 19, 1920.

SEID PAK SING

vs.

COLUMBIA AGRICULTURAL COMPANY, a Corporation,

Order Extending Time to and Including March 31, 1920, to File Record and Docket Cause.

Now, at this day, for good cause shown, IT IS ORDERED that the time for filing the transcript of record in cause, and docketing the same, in the United States Circuit Court of Appeals for the Ninth Circuit, be, and the same is hereby extended to and including March 31, 1920.

CHAS. E. WOLVERTON,
Judge.

[Endorsed]: No. 3469. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to and Including Mar. 31, 1920, to File Record Thereof and to Docket Case. Filed Mar. 25, 1920. F. D. Monckton, Clerk. s/